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No. 99 858

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1999

CITY OF ANAHEIM,
*Petitioner,*

*vs.*

CALIFORNIA CREDIT UNION LEAGUE, AND
UNITED STATES OF AMERICA,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether, under 12 U.S.C. § 1768 and the federal supremacy clause, the City of Anaheim can constitutionally levy its transient occupancy tax upon employees of federal credit unions (or federal employees) when the employee is on employer business and the employee pays the hotel with an employer check advanced by the employer.

## PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were petitioner City of Anaheim and respondents California Credit Union League and the United States of America.[1]

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[1] *Amici curiae* briefs were filed in the court of appeals below. Fifty cities joined in a brief filed by the National Institute of Municipal Law Officers in support of petitioner City of Anaheim. The Credit Union National Assoc. Inc., joined by the Hawaii Credit Union League, National Association of Federal Credit Unions and United States Government filed briefs in support of respondent California Credit Union League. The United States Government is now a co-plaintiff.

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## PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The two opinions of the Ninth Circuit Court of Appeals are reported at 95 F.3d 30 and 190 F.3d 997, and are attached hereto as Appendix A. The United States District Court's Order Denying Motion to Dismiss and Granting Summary Judgment is attached hereto as Appendix B. The Judgment is attached hereto as Appendix C.

## JURISDICTION

The court of appeals entered its two judgments on September 9, 1996 and September 1, 1999 (App. A). This petition is filed within 90 days of entry of the last judgment pursuant to 28 U.S.C. § 2101(c) and United States Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The principal statutory provision involved in the case is 12 U.S.C. § 1768. The language of the statute is included *verbatim* in Appendix D1 and the pertinent portion quoted below:

> "The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income

> shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to . . . taxation to the same extent as other similar property is taxed. . . ."

## STATEMENT OF THE CASE

This case concerns the relationship between the City's transient occupancy tax ("TOT tax") and 12 U.S.C. § 1768, which confers on federal credit unions broad immunity from federal, state, and local taxation.

The issue presented is whether the City of Anaheim can constitutionally impose its TOT tax upon employees of federal credit unions (or federal employees) when the employee is on employer business (as evidenced by an exemption form) and the employer pays the hotel directly through an employer check. Although 12 U.S.C. § 1768 exempts a credit union, it does not exempt the credit union's employees from the transient occupancy tax which is imposed on the occupant of the room, the employee, not the employer. 75 Ops.Cal.Atty.Gen. 86 (1992). To hold otherwise would deprive cities across the nation of significant revenue to pay for the local services provided to transients.

In November, 1993, two dozen federal credit unions sent their employees to attend a credit union conference at the Disneyland Hotel in the City of Anaheim. The Disneyland Hotel assessed the employees a transient occupancy tax pursuant to the Anaheim Municipal Code Chapter 2.12 (attached hereto as Appendix E). These

employees sought an exemption from payment of the transient occupancy taxes, even though these employees burdened City services, just like the other transients staying at the hotel.

On September 1, 1994, plaintiff the California Credit Union League (hereinafter "California Credit," "Credit Union" or "League") filed a complaint against the City of Anaheim in the United States District Court for the Central District of California. The lawsuit alleged a violation of 12 U.S.C. § 1768.[2] The complaint prayed that the court enter a declaratory judgment that all federal credit unions are not liable for the payment of hotel occupancy taxes levied by the City of Anaheim, where the hotel rooms triggering the hotel occupancy taxes have been contracted for in the name of federal credit unions, and said rooms have been paid for directly by federal credit unions.

The defendant City of Anaheim (hereinafter "the City" or "Anaheim") filed a motion to dismiss for failure to state a claim upon which relief can be granted. The motion requested an order dismissing the action on the grounds that, as a matter of law, the City of Anaheim can properly levy a TOT tax upon a federal credit union employee who, while on federal credit union business, contracts for a hotel room and submits payment for the room with a check issued by a federal credit union.

The Credit Union filed its opposition to defendant City of Anaheim's motion to dismiss and a motion for summary judgment, which was granted.

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[2] *California Credit Union League v. City of Anaheim*, Case No. CV 94-5991 ER (Ghx). The complaint invoked the district court's jurisdiction under 28 U.S.C. § 1331 as well as a federal question under 12 U.S.C. § 1768 (taxation of federal credit unions).

The district court erred when it held that the tax was levied against the federal credit union and not the individual employees when they are occupying the hotel room on their employer's business. (App. F) In its oral ruling (App. F4), the district court made various holdings, including:

- that under existing law in order to resist the state or any governmental entity's taxing power, the private taxpayer must actually stand in the government's shoes. This comes from the Supreme Court in the case of *United States v. New Mexico* (1982) 455 U.S. 720. (App. F4).
- that the federal credit union employees occupy a space in the hotel under the facts of this case because the government as an entity cannot physically occupy such space. The only way the credit union can occupy the hotel room is through its employees. There is no way for the credit union to occupy a hotel room. Their interest in renting the room is not separate from their employees' interest. (App. F4).
- that, unlike *United States v. Montgomery County*, 761 F.2d 998 (4th Cir. 1985) and other cases relied upon by the City, the legal incidence of the tax falls on the credit union as their employer, not on the employees. **The credit union does not occupy hotel rooms**, only its employees do. (App. F4).

On appeal, the Ninth Circuit affirmed the district court judgment. The crux of its ruling, based upon *United States v. New Mexico* (1982) 455 U.S. 720, was "that federal employees are constituent parts of the United States, at least with respect to their professional duties." (App. A5). The Ninth Circuit held that "[b]ecause the federal credit unions' employees were

attending to credit union business while staying at the Disneyland Hotel [in Anaheim], they were 'constituent parts' of the credit union and immune from Anaheim's transient occupancy tax under Section 1768." (App. A5). The court of appeals held that to avoid paying state or local taxes, "a private taxpayer must actually stand in the Government's shoes." (App. A4). The court of appeals noted that independent of the protection afforded by Section 1768, courts have generally considered federal credit unions to be instrumentalities of the federal government and, thus, immune from state taxation under the supremacy clause. (App. A3).

Anaheim's petition for writ of certiorari was granted and the Ninth Circuit's decision was vacated by the Supreme Court in light of *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997), and the case was remanded. *City of Anaheim v. California Credit Union League*, 520 U.S. 1261 (1997). In *Farm Credit Services*, the Supreme Court held that the Tax Injunction Act prevented Production Credit Associations (federally charted corporate financial institutions that make loans to farmers) from suing a state in federal court to enjoin state taxation unless the United States was joined as a plaintiff. *See id.* at 824. After the Supreme Court vacated the Ninth Circuit's decision in this case in light of *Farm Credit Services*, the Ninth Circuit received a joint motion from the League and the United States to join the United States as co-plaintiff. The Ninth Circuit concluded that the United States can join this action as a co-plaintiff and that the United States' belated joinder retroactively cures any jurisdictional defect that previously existed. (App. A9). The Ninth Circuit then reaffirmed the district court's judgment in favor of the League for the reasons stated in their prior opinion. (App. A15).

Without a discussion of the only federal case on point, the Ninth Circuit ignored the court of appeals decision in *United States v. Montgomery County*, 761 F.2d 998 (4th Cir. 1985) which utilized the dictionary meaning of the word "transient" in holding that a county tax on transients renting hotel sleeping accommodations fell on the occupants of the sleeping accommodations [who were outpatients at the National Institutes of Health ("NIH") an instrumentality of the federal government], and not on the NIH which reserved and paid for the rooms, even though the term was defined in the statute imposing a tax on all transients renting hotel sleeping accommodations. A federal credit union, "or the United States Government which arranges a room for a month . . . which is occupied by any . . . *employee* . . . simply does not meet the definition of 'transient.' " *United States v. Montgomery County*, 761 F.2d 998, 1001 (4th Cir. 1985).

The practical effect of the Ninth Circuit's opinion is to permit all federal credit union and federal employees to stay in hotels in any city without paying a TOT tax while they are on business. Thousands of dollars in TOT tax revenue will be lost annually to the City of Anaheim, and other cities nationwide, if the Ninth Circuit decision stands. This case involves a question of exceptional national importance for all cities that depend on this revenue to fund vital local services like police and fire protection.

## REASONS FOR GRANTING THE PETITION

Not only is the Ninth Circuit decision in direct conflict with the Fourth Circuit's precedent in *United States v. Montgomery County*, 761 F.2d 998 (4th Cir. 1985), it is contrary to the plain language of the Anaheim Municipal Code. A federal credit union, which arranges a room that is occupied by any *employee* simply does not meet the definition of "transient."

"Since the tax falls on the transient, the occupant of the sleeping accommodations, the fact of reimbursement by the [federal credit union] . . . does not invalidate it under the supremacy clause." *United States v. Montgomery County*, 761 F.2d 998, 1002 (4th Cir. 1985) citing *United States v. New Mexico*, 455 U.S. 720, 735, 102 S.Ct. 1373, 1383, 71 L.Ed.2d 580, 592 (1982)("immunity cannot be conferred simply because the tax is paid with Government funds . . . where the contractor made expenditures under an advanced funding arrangement similar to the one involved here.") The federal credit union's voluntary agreement to reimburse, or even fund in advance, an employee for room charges, including TOT taxes, does not make the federal credit union's payments direct disbursements of federal credit union funds to the City.

### I.

### THE NINTH CIRCUIT DECISION IS AN UNWARRANTED EXTENSION OF THIS COURT'S PRECEDENTS

Only two federal cases on collecting taxes from federal employees were discussed by the Ninth Circuit opinion, in *United States v. County of Fresno* (1977) 429

U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 and *United States v. New Mexico* (1982) 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580. In *Fresno*, this Court held that the State of California could collect a property tax from United States Forest Service employees for their possessory interests in houses located on federal property in national forests and furnished to them as part of their compensation. The *Fresno* Court concluded "that a State may, in effect, raise revenues on the basis of property owned by the United States as long as that property is being used by a private citizen or corporation and so long as it is the possession or use by the private citizen that is being taxed." *Id.* 429 U.S. at 462, 97 S.Ct. at 704, 50 L.Ed.2d at 692. The *Fresno* Court then applied this rule to the facts presented in that case:

> "The 'legal incidence' of the tax involved in this case falls neither on the Federal Government nor on federal property. The tax is imposed solely on private citizens who work for the Federal Government. The tax threatens to interfere with federal laws relating to the functions of the Forest Service *only* insofar as it may impose an economic burden on the Forest Service — causing it to reimburse its employees for the taxes legally owed by them." *Fresno, supra*, 429 U.S. at 464, 97 S.Ct at 705, 50 L.Ed.2d at 693 (emphasis in original).

The Ninth Circuit attempted to distinguish *Fresno* stating that "[u]nlike the Forest Service employees in *Fresno*, the employees of the credit unions pay for housing elsewhere and had to bear the additional cost of staying in Anaheim solely because they were in the city

on credit union business." (App. A5). The Ninth Circuit holds, in effect, that employees of federal instrumentalities and the federal government are federal instrumentalities themselves. Federal credit union employees and federal employees are not federal agencies or instrumentalities. This is contrary to *Fresno, supra*, 429 U.S. at 464, 97 S.Ct. at 705, 50 L.Ed.2d at 693, which held that the legal incidence of a state tax fell on a federal employee carrying out governmental business. Nevertheless, this Court held that tax immunity was inappropriate. The City's TOT tax is imposed solely on private citizens, "transcients," who happen to work for the credit unions or the federal government.

Respondent League has argued that the Ninth Circuit merely held that when doing the business of the government, government employees stand in the place of the government and, thus, cannot be taxed. In *Comptroller v. World Inns*, (Md. 1987) 310 Md. 154, 163 n.4, 528 A.2d 477, 481 n.4, the court held that federal employees are not federal agencies or instrumentalities when contracting for the rental of hotel rooms and are subject to state sales tax, citing this Court's decision in *Fresno, supra*, 429 U.S. 452 at 464, 97 S.Ct. 699 at 705, 50 L.Ed.2d 683 at 693, as supporting this position. It is questionable when an employee is sleeping in a hotel bed or eating dinner in the hotel restaurant that he or she is doing the business of the federal government. Further, where an employee pays for the hotel room with a private check, it is questionable whether the employee "stands in the shoes of the federal government" or a federal credit union.

This Court's decisions have recognized limitations on the immunity doctrine, including *New Mexico*, where this Court upheld a tax on federal contractors even though the property purchased passed directly to the

federal government and was actually paid for with drafts drawn on funds of the United States Treasury.

The Ninth Circuit held that this Court's analysis in *New Mexico* compels the conclusion that federal employees are constituent parts of the United States, at least with respect to their professional duties. The Ninth Circuit also held that when acting on behalf of the federal government, the congruence between the professional interests of the employee and those of the government is complete. Applying this analysis, the Ninth Circuit concluded that because the federal credit unions' employees were attending to credit union business while staying at the Disneyland Hotel in Anaheim, they were "constituent parts" of the credit union and immune from Anaheim's transient occupancy tax under § 1768. (App. A5). However, credit union employees are paid for their services like federal contractors and their employer advanced to the them the room and tax charges. Regarding the use of government checks for payment, this Court stated:

> "[T]he Government earnestly argues that its contractors are entitled to tax immunity because, among other things, they draw checks directly on federal funds, instead of waiting a time for reimbursement. . . . We cannot believe that an immunity of constitutional stature rests on such technical considerations, for that approach allows 'any government functionary to draw the constitutional line by changing a few words in a contract.' " *New Mexico, supra*, 455 U.S. at 737, 71 L.Ed.2d at 594.

The *New Mexico* court further held that the legal incidence of the tax fell on the contractors, and concluded that the contractors were not agencies or instrumentalities of the United States. *Id.* 455 U.S. at 740-741, 102 S.Ct. at 1385-86. In *Comptroller*, the court held that federal employees are not federal agencies or instrumentalities when contracting for the rental of hotel rooms and are subject to being taxed.

## II.

## THE NINTH CIRCUIT DECISION CONFLICTS WITH THE FOURTH CIRCUIT COURT OF APPEALS DECISION IN *MONTGOMERY COUNTY*

The only decision on point by another circuit is directly at odds with the Ninth Circuit. Reversing a lower court, the Court of Appeals in *Montgomery County*, 761 F.2d 998, 999 (4th Cir. 1985) used the dictionary meaning of the word "transient" in holding that a county tax on transients renting hotel sleeping accommodations fell on the occupants of the sleeping accommodations [who were outpatients at the National Institutes of Health ("NIH")], and not on the NIH which reserved and paid for the rooms, even though the term was defined in the statute imposing a tax on all transients renting hotel sleeping accommodations.

The NIH had arranged with a private inn to supply accommodations, with NIH undertaking to meet room costs. *Id.* Even though the outpatients of the NIH were doing the "business" of the NIH, the Fourth Circuit upheld the TOT tax under the following facts: "[T]he National Institutes of Health, if not an arm at least a finger of the United States Government, since 1971 have

instituted a policy of providing sleeping accommodations to outpatients under one or more of the programs conducted by the National Institutes. The patients have come to Bethesda, Maryland or its environs for treatment, the elapsed periods of their stays in hotels and motels in the area lasting no more than seven consecutive days. The NIH arranged with a private hostelry, United Inn of America, as an independent contractor, to supply accommodations, with NIH undertaking to meet room costs." *Id.*

Noting that the local statute defined "transient" as a person who "obtained sleeping accommodations" for seven consecutive days or less, the *Montgomery County* court reasoned that while the NIH, in reserving and paying for rooms at the United Inn of America, may have been obtaining the rooms for use by others, it had not done so as a transient, and the legislative intent was clear that "obtain" was meant to apply to the person who occupied the room. The *Montgomery County* court found that the tax was imposed on the temporary room occupant and not on the NIH which had booked the accommodations.

The objective of the transient occupancy tax is to tax transients.[3] Federal credit union employees coming and going to a convention amply fit the description of transients. A federal credit union, "or the United States Government which arranges a room for a month . . . which is occupied by any . . . *employee* . . . simply does not meet the definition of 'transient.' "[4] *Montgomery*

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[3] The tax is imposed on "each transient is subject to and shall pay a tax in the amount of . . ." Anaheim Municipal Code § 2.12.010.010.

[4] The point derives from the definition of a transient as: ". . . any person who exercises *occupancy* . . . ." Anaheim Municipal Code, § 2.12.005.100. The term "occupancy" simply does not extend to a

(continued)

*County, supra*, 761 F.2d at 1001 (4th Cir. 1985). "Transitory, passing, ephemeral, momentary, fleeting, evanescent;"[5] each fits the overnight employee guest. Use of those words for entities such as a federal credit union is simply inapposite.

Thus, federal credit unions, in making reservations and paying for rooms, have been reserving the rooms for use by employees, but they have not done so as a transient. In other words, to be a "transient" does not mean exclusively or even principally to book the room for employees. Included within the definition of the term "transient" is the term "occupancy" or the concept of achieving actual physical possession and use. Anaheim Municipal Code § 2.12.005.110. To obtain entry is a common phase which applies to "occupancy" as well as, or even more than, arrangement for the use by employees.[6]

Taxation is an eminently practical matter. If the hotel (serving as the statutory tax-collector) hands over the correct sum due the City of Anaheim, the City is not going to object to the hotel accepting payment from the federal credit union employer. In *Montgomery County, supra*, 761 F.2d at 1002, n.13, the NIH gave vouchers to its guests. The vouchers or the cash they represented, in the hands of the visitors occupying the sleeping accommodations, were turned over to the inn. That manner of proceeding comports entirely with a construction of the

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(fn. continued)
federal credit union, the United States Government or other nonindividuals. Even the district court concluded that **the credit union does not occupy hotel rooms.** (App. F4).

[5] See *Webster's Third New International Dictionary*, p. 2428.

[6] The primary meanings of "occupancy" and "occupy" are "the taking and holding possession of" and "to take possession of." *Webster's Third New International Dictionary*, p. 1560-1561.

law which made the transient guests of the NIH the taxpayers, rather than the NIH themselves. *Id.* This is exactly the situation at bar where the federal credit union has provided its employees checks to pay for their rooms.

"Since the tax falls on the transient, the occupant of the sleeping accommodations, the fact of reimbursement by the (federal credit union or) United States . . . does not invalidate it under the supremacy clause." *Montgomery County, supra*, 761 F.2d at 1002 citing *New Mexico, supra*, 455 U.S. at 735, 102 S.Ct. at 1383, 71 L.Ed.2d at 592 (1982)("immunity cannot be conferred simply because the tax is paid with Government funds . . . where the contractor made expenditures under an advanced funding arrangement similar to the one involved here."). The federal credit union's voluntary agreement to reimburse, or even fund in advance, an employee for transient occupancy taxes does not make the federal credit union's payments direct disbursements of federal credit union funds to the City of Anaheim.

In 55 Comp.Gen. 1278 (1976) the Comptroller General of the United States examined the propriety of a rental tax imposed on all transient guests renting hotel or motel rooms in Anchorage, Alaska. The Bureau of Indian Affairs of the United States Department of the Interior contracted with hotels and motels in Anchorage to pay housing costs for Indian students staying overnight in Anchorage while traveling between government schools and their homes. The term "Guest" was defined by the statute as "an individual corporation, partnership or association *paying monetary consideration for* the use of a sleeping room or rooms in the hotel-motel." [Emphasis added.] As the Bureau paid for the rooms, and the tax was imposed on "guests" — those who pay for their rooms — the legal incidence of the tax was held

to have impermissibly fallen on the United States. Based on the Comptroller General's decision, the United States has argued that the Government can assert immunity where it directly contracts for the room.

However, in the course of his opinion concerning the Anchorage Alaska tax, the Comptroller General discussed an earlier opinion, 53 Comp.Gen. 69 (1973), which considered the Montgomery County hotel room rental tax (the same tax as in the *Montgomery County* case cited above). The decision at 53 Comp.Gen. 69 (1973) held the **"transient" was the room occupant, and not the Government**, and thus the Government was not taxed directly. But in this later opinion, the Comptroller General essentially reversed his previous opinion:

> "[T]he [Montgomery] County Code defines 'transient' as a 'person' who *obtains* sleeping accommodations and defines 'person' as any 'individual, corporation, company, association, firm,' etc. Since the Government is the person who *obtained* and paid for these rooms under the County Code, the Government is the transient. Hence, our holding above as to the Anchorage motel tax would be equally applicable to the Montgomery County motel tax. Therefore, our holding in 53 Comp.Gen. 69 is modified to the extent it is inconsistent with the foregoing." [Emphasis added.]

55 Comp.Gen. at 1280-81. These two opinions are discussed in the district court opinion in *United States v. Montgomery County*, 586 F.Supp. 227, 229 (D. Maryland 1984).

The opinion at 55 Comp.Gen. 1278 (1976) is inapplicable to the case at bar. Here the transient occupancy tax falls on the transient who exercises occupancy of the sleeping accommodations in the hotel. Although the credit union obtained and paid for the room for its employee, nevertheless, the credit union is not a "transient" as defined in the Anaheim Municipal Code. " 'Transient' means any person who exercises occupancy . . ." Anaheim Municipal Code § 2.12.005.100. (App. E4). "Person" is not defined in the Anaheim Municipal Code.

The construction of statutes imposing tax liabilities may be supported by dictionary definitions, particularly where the word or words under judicial consideration are not specifically defined in the statute and have a common meaning. *Montgomery County, supra*, 761 F.2d at 1001 n.9, n.10. The primary meaning of "person" is "a human being." *Webster's Third New International Dictionary*, p. 1686; *Black's Law Dictionary*, Fifth Edition, p. 1028. Further, Anaheim Municipal Code § 2.12.005.050 defines "operator" as "any person, *corporation, entity, or partnership* . . ." Thus, "person" means "a human being" in this context. Otherwise there would have been no reason to add "corporation" or "entity" to the definition of "operator." Corporations or entities cannot physically occupy hotel rooms; so, "person" can only mean the human occupant of the sleeping accommodations. This is what the City of Anaheim has consistently argued. The fact that a transient can only be a human being and not a corporation means the legal incidence of the tax is not on the credit union. Thus, a credit union is not a "person" under the City's municipal code. The City of Anaheim has not imposed the tax directly on the credit union as the corporation or entity which booked the rooms, but on the employee, the

human being who slept in them. The tax is due from the room occupants, and any arrangement made by the credit union to advance payment on their behalf is altogether collateral, and does not invalidate the power to assess the tax against the room occupant and to impose a tax collecting duty on the hotel. The City has imposed its tax solely on the occupants of the sleeping accommodations. *Montgomery County, supra*, 761 F.2d at 1002-1003.

Clearly there is a conflict between the Ninth Circuit and the Fourth Circiut about whether the TOT tax falls on the employee transient occupant of the sleeping accommodations or the federal credit union. That conflict requires resolution by this Court.

## III.

## THE NINTH CIRCUIT DECISION PRESENTS A JUSTICIABLE AND IMPORTANT QUESTION OF FEDERAL LAW

Respondent League previously argued that the City failed to establish any of the criteria set forth in Rule 10 of the Supreme Court Rules demonstrating a need for Supreme Court review. However, the League "agree[d] with Anaheim that the Ninth Circuit addresses an important taxation issue." Prior Opposition at 21. The Ninth Circuit's decision also directly conflicts with *Montgomery County*, 761 F.2d 998, the only federal appellate case to consider TOT taxes.

This important question of federal taxation law affects whether all federal credit unions and federal employees can stay in hotels in any city throughout the country without paying a TOT tax while they are on business. Thousands of dollars in TOT tax revenue will be lost

annually to the City of Anaheim and other cities nationwide if the Ninth Circuit decision stands. This case involves a question of exceptional national importance for all cities that depend on this revenue to fund vital local services such as police and fire protection. When an employee is robbed in a hotel parking lot, it is the employee, not the employer, who calls the city's police department requesting assistance. Even Respondent League has admitted that this is, "an era of shrinking public funds . . . ." Prior Opposition at 10. All cities need revenue for the economic burdens placed on them by transients visiting their cities.

Respondent League has argued that the decision in *Montgomery County* does not render a holding concerning employees of a federal instrumentality. This is just plain wrong and ignores the crucial issue in this case. The TOT tax itself is levied on the "transient" and "exactly who that has been being the crux of the case." *Montgomery County, supra*, 761 F.2d at 999 n.2. That court dealt with the issue of "employees" and held that "[t]he outpatients have come and gone in a fashion amply fitting description as transients . . . the United States Government which arranges a room . . . which is occupied only a day or two at a time by any one visiting ***employee*** or guest simply does not meet the definition of 'transient.' " *Montgomery County, supra*, 761 F.2d at 1001 (emphasis added). The Fourth Circuit also considered the relevant decisions of this Court in rendering its main holding. "Since the tax falls on the transient, the occupant of the sleeping accommodations, the fact of reimbursement by the United States or one of its agencies does not invalidate it under the supremacy clause. E.g., *United States v. New Mexico*, 455 U.S. 720, 735, 102 S.Ct. 1373, 1383, 71 L.Ed.2d 580 (1982); *Alabama v. King and Boozer*, 314 U.S. 1, 8-9, 62 S.Ct. 43, 45, 86

L.Ed. 3 (1941)." *Montgomery County, supra*, 761 F.2d at 1002. The Ninth Circuit's decision fails to even mention or apply the precedent established by the Fourth Circuit.

Respondent League's claim that the City has constructed a semantic fiction that it taxes the "employees" of the federal credit union while they are conducting the credit union's business to justify its TOT tax, falls in the face of the above holdings by the Fourth Circuit. The City has always maintained that "the tax falls on the transient, the occupant of the sleeping accommodations." *Id.* This is not a semantic fiction, but, rather, giving the term "transient" its ordinary meaning. On the other hand, Respondent League asks this Court to adopt the legal fiction that "a federal credit union (like a corporation or any other nonnatural person) can act *only* through its employees and agents" (Prior Opposition at 11), or the Ninth Circuit's legal fiction that "federal employees are constituent parts of the United States, at least with respect to their professional duties." (App. A5). A credit union employee occupying a hotel room while at a conference is no less a "transient" than a person occupying a hotel room while on vacation.

The California Attorney General has stated: "A city may levy a transient occupancy tax upon a state employee who, while on state business, contracts for a hotel room and submits payment for the room with a state issued check." 75 Ops.Cal.Atty.Gen. 86, 89 (1992). The California Attorney General after considering the relevant decisions of this Court, including *United States v. County of Fresno* (1977) 429 U.S. 452, 464, 97 S.Ct. 699, 50 L.Ed.2d 683 and *United States v. New Mexico* (1982) 455 U.S. 720, 737, 102 S.Ct. 1373, 71 L.Ed.2d 580, rejected "the argument that the election by a governmental agency to advance the room rental charges

incurred by its employees while on official business transmutes a local transient occupany tax into a direct tax on the goverment. In our view, the tax remains on the employee for 'the privilege of occupying a room.' " 75 Ops.Cal.Atty.Gen. 86, 88 (1992).

Federal employees are not federal agencies or instrumentalities. In *Fresno, supra*, 429 U.S. at 464, 97 S.Ct. at 705, 50 L.Ed.2d at 693, this Court upheld the legal incidence of a state tax that fell on a federal employee carrying out governmental business. Even the Comptroller General's original opinion, 53 Comp.Gen. 69 (1973), which considered the Montgomery County hotel room rental tax (the same tax as in the *Montgomery County* case cited above), held the **"transient" was the room occupant, and not the Government**, and thus the Government was not taxed directly.

The questions raised here are important. Without a clarification by this Court, cities all over the country will face uncertainty in the application of their TOT taxes. The issue of whether the court has to make a distinction if the employee pays for the hotel room with a private check was raised below. The Ninth Circuit opinion does not directly answer this issue. Respondents have taken the position that the Ninth Circuit opinion allows payment for the hotel room to be made *without* an employer check, *i.e.*, with personal funds. This argument flies in the face of the cases that hold that where payment is made with personal funds there is no immunity from taxes.

The Comptroller General of the United States has long taken the position that "reimbursement" situations are not covered by the Federal Government's tax immunity. 55 Comp.Gen. 1278 (1976). In *Comptroller v. World Inns* (Md. 1987) 310 Md. 154, 156, 528 A.2d 477, 478, the court considered whether a government

employee who pays for the rental of a hotel room with personal funds while on government business may be required to pay retail sales tax. The evidence adduced was that federal employees had executed an exemption certificate (just like the credit union employees) and paid for the rooms with cash, personal credit card, or personal check. *Id.* The Tax Court held that because the Comptroller had no way of verifying whether a government employee who personally paid for a room was actually on government business, the rentals were subject to the sales tax. *Comptroller, supra*, 310 Md. at 157, 528 A.2d at 478. The question before the court was whether federal employees renting hotel rooms in their own names and paying for the rooms with personal funds enjoy immunity from state taxation. *Comptroller*, 310 Md. at 158, 528 A.2d at 479. In the court's 1987 opinion, it reviewed several cases on collecting taxes from federal employees including *United States v. County of Fresno*, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977).

In *Keystone Auto Leasing, Inc. v. Norberg*, 486 A.2d 613 (R.I. 1985), the question presented to the Rhode Island Supreme Court was whether employees of the federal government while on government business who paid for the rentals of automobiles in cash or with personal credit cards and were reimbursed by the government may be required to pay the State's sales tax. The Rhode Island court examined the United States Supreme Court decisions which have recognized limitations on the immunity doctrine, including *United States v. New Mexico* (1982) 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed. 2d 580. The Rhode Island Supreme Court concluded:

> "What has emerged from these (United States Supreme Court) decisions is a 'legal incidence' test that requires a determination of who is the

> 'purchaser' upon whom the ultimate burden of the tax will fall. As long as a state makes no claim of right to collection from the federal government or its instrumentalities, a state may impose a tax on those entities dealing for their own purposes with the federal government." *Keystone*, *supra*, 486 A.2d at 615.

The *Keystone* court applied the legal incidence test and concluded that "when federal employees lease automobiles and pay for them with cash or personal credit cards, the legal incidence of the tax falls on the employees and not the federal government." Therefore, the court concluded that the employees were "not immune from state taxation and that the rentals in question constituted a taxable event." *Keystone, supra*, 486 A.2d at 616.

After reviewing the above, the *Comptroller* court held that the federal employees were the "purchasers," for they contracted directly with the Inn for the rental of rooms and paid for the rooms with their personal funds. The federal government was in no sense a party to the room rental arrangement. Consequently, the legal incidence of the tax fell on the employees and not the United States. The court therefore held "that because the legal incidence of the tax did not fall directly on the United States, or its agencies or instrumentalities, the rentals of hotel rooms by federal employees in this case were not immune from state sales tax." *Comptroller, supra*, 310 Md. at 162-163, 528 A.2d at 480-481.

The Ninth Circuit holds that employees of federal instrumentalities are federal instrumentalities themselves. *Comptroller, supra,* held that federal employees are not federal agencies or instrumentalities, citing this

Court's decision in *Fresno*, 429 U.S. 452 at 464, 97 S.Ct. at 705, 50 L.Ed.2d at 693, as supporting this position. *Comptroller, supra*, 310 Md. at 163 n.4, 528 A.2d at 481 n.4.

Based on the above, the California Attorney General found that the election by a governmental agency to advance the room rental charges incurred by its employees while on official business did *not* transmute a local transient occupancy tax into a direct tax on the government. 75 Ops.Cal.Atty.Gen. 86, 88 (1992); 65 Ops.Cal.Atty.Gen. 267, 269 (1982). While not controlling, the Attorney General's opinions are accorded substantial weight by state courts. *Mountain View Union High School Dist. v. City Council* (1959) 168 Cal.App.2d 89, 335 P.2d 957, 961 n.2.

## CONCLUSION

This case presents a serious taxation issue concerning the constitutionality of TOT taxes invoked in thousands of hotels daily throughout California and the nation. Petitioner respectfully requests that this Court grant Certiorari to review the issue on the merits.

DATED: November 15, 1999.

Respectfully submitted,

MOSES W. JOHNSON, IV
*Counsel of Record*

OFFICE OF THE CITY ATTORNEY
CITY OF ANAHEIM

*Counsel for Petitioner*
CITY OF ANAHEIM

# APPENDIX A

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CALIFORNIA CREDIT UNION LEAGUE,
*Plaintiff-Appellee,*

v.

CITY OF ANAHEIM,
*Defendant-Appellant.*

No. 95-55205
D.C. No.
CV-94-05991-ER
OPINION

Appeal from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
June 6, 1996—Pasadena, California

Filed September 9, 1996

Before: Robert R. Beezer and Melvin Brunetti,
Circuit Judges, and Jack E. Tanner,* District Judge.

Opinion by Judge Brunetti

## COUNSEL

Moses W. Johnson, Deputy City Attorney, Anaheim, California, for the defendant-appellant.

Thomas H. Ott, Ott, Marquez & Horowitz, Glendale, California, attorneys for the plaintiff-appellee.

*Hon. Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

## OPINION

BRUNETTI, Circuit Judge:

The City of Anaheim ("Anaheim") appeals the district court's grant of summary judgment in favor of the California Credit Union League ("League"). The League successfully sought a declaratory judgment that the city's application of its transient occupancy tax to credit union employees staying in local hotels violated 12 U.S.C. § 1768. Both parties agreed before the district court that the case should be resolved by summary judgment. The district court awarded summary judgment to the League. After reviewing *de novo*, *Warren v. City of Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995), we affirm.

I.

There is little dispute about the facts of this case. In November of 1993, federal credit union employees stayed at the Disneyland Hotel in Anaheim. The employees were attending a credit union seminar and thus were on credit union business. The employees were assessed a transient occupancy tax pursuant to Anaheim Municipal Code Chapter 2.12. The code defines a transient as anyone occupying a hotel room for thirty days or fewer. The tax is 13% of the rate charged by the hotel.

II.

[1] 12 U.S.C. § 1768 confers upon federal credit unions broad immunity from federal, state, and local taxation:

> The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, sur-

> pluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to. . .taxation to the same extent as other similar property is taxed. . . .

12 U.S.C. § 1768 (1994). Independent of the protection afforded by Section 1768, courts have generally considered federal credit unions to be instrumentalities of the federal government and thus immune from state taxation under the supremacy clause. *See, e.g., T I Fed. Credit Union v. DelBonis*, 72 F.3d 921, 934 (1st Cir. 1995); *United States v. State of Michigan*, 851 F.2d 803, 807 (6th Cir. 1988). Relying on our decision in *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1132 (9th Cir. 1994), the National Institute of Municipal Officers ("cities") argues, in an amicus brief, that federal credit unions are not instrumentalities of the United States.[1] Because courts have considered the immunity afforded by Section 1768 to be coterminous with that afforded by the supremacy clause, we do not address the cities' argument. *See Michigan*, 851 F.2d at 805 n.1, 807; *United States v. State of Maine*, 524 F. Supp. 1056, 1058-1060 (D. Me. 1981). If credit unions would be immune from local taxation were they to be considered an instrument of the federal government, then regardless of the instrumentality question they are immune from local taxation under Section 1768. *See Michigan*, 801 F.2d at 807.

Appellant, appellee, and many of the amici focus on whether the incidence of the Anaheim tax falls on the credit union or the employees. That indeed has been the test this court and the Supreme Court have applied when considering

[1]Before the district court, Anaheim conceded that federal credit unions are instrumentalities of the federal government. Anaheim has not changed its position before this court.

whether sales and other taxes on **independent** subcontractors of the United States are unconstitutional. *See, e.g., United States v. State Tax Comm'n of Miss.*, 421 U.S. 599, 608 (1975); *United States v. California State Bd. of Equalization*, 650 F.2d 1127, 1130-31 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982). Even if the legal incidence of a tax falls on contractors or individuals, however, the question remains whether those parties are independent entities of the United States. *United States v. New Mexico*, 455 U.S. 720, 738 (1982). If they are not independent, the tax is invalid because it is a tax on the United States and thus the question of where the incidence of taxation lies is moot. *See id.*

In *New Mexico*, the Supreme Court, noting "the confusing nature of our precedents," concluded that the essence of the federal government's tax immunity is a prohibition against states assessing taxes "directly upon the United States." 455 U.S. at 733. Immunity from state or local taxation is only appropriate "when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *Id.* at 735. To avoid paying state or local taxes, "a private taxpayer must actually stand in the Government's shoes." *Id.* at 736 (internal citations omitted). *See also United States v. County of San Diego*, 965 F.2d 691, 697 (9th Cir. 1992) (quoting *New Mexico*).

The Supreme Court in *New Mexico* rejected the federal government's argument that contractors are not separate entities of the United States:

> The contractors here are privately owned corporations; [g]overnment officials do not run their day-to-day operations nor does the Government have any ownership interest. In contrast to federal employees, then, Sandia and its fellow contractors cannot be termed constituent parts of the Federal Government.

> It is true, of course that employees are a special type of agent, and like the contractors here employees are paid for their services. But the differences between an employee and one of these contractors are crucial. The congruence of professional interests between the contractors and the Federal Government is not complete; their relationships with the Government have been created for limited and carefully defined purposes.

*Id.* at 740-41 (internal citations omitted).

[2] The Court's analysis in *New Mexico* compels the conclusion that federal employees are constituent parts of the United States, at least with respect to their professional duties. *See id.* When acting on behalf of the federal government, the congruence between the professional interests of the employee and those of the government is complete. *See id.*

[3] Because the federal credit unions' employees were attending to credit union business while staying at the Disneyland Hotel in Anaheim, they were "constituent parts" of the credit union and immune from Anaheim's transient occupancy tax under Section 1768. *See id. Cf. United States v. County of Fresno*, 429 U.S. 452, 465-66 (1977). In *Fresno*, the Supreme Court held that employees of the Forest Service could be taxed for their possessory interest in houses on federal land. 429 U.S. at 465-66. The Court stressed that the housing was of personal benefit to the employees since everyone has to pay for housing. *Id.* Unlike the Forest Service employees in *Fresno*, the employees of the credit unions pay for housing elsewhere and had to bear the additional cost of staying in Anaheim solely because they were in the city on credit union business. *See* 429 U.S. at 465-66. Therefore, Anaheim's application of its transient occupancy tax to those employees violated Section 1768.

AFFIRMED.

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

| | |
|---|---|
| CALIFORNIA CREDIT UNION LEAGUE,<br>*Plaintiff-Appellee,*<br>v.<br>CITY OF ANAHEIM,<br>*Defendant-Appellant.* | No. 95-55205<br>D.C. No.<br>CV-94-05991-ER<br>OPINION |

On Remand from the United States Supreme Court

Filed September 1, 1999

Before: Robert R. Beezer and Melvin Brunetti, Circuit Judges, and Jack E. Tanner,[1] District Judge.

Opinion by Judge Brunetti

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[1]Hon. Jack E. Tanner, Senior United States District Judge for the Western District of Washington, sitting by designation.

## OPINION

BRUNETTI, Circuit Judge:

The California Credit Union League ("League") filed this action against the City of Anaheim ("Anaheim") seeking a declaratory judgment that the city's application of a transient occupancy tax to credit union employees staying in local hotels violated 12 U.S.C. § 1768. The district court awarded summary judgment to the League and we affirmed. *See California Credit Union League v. City of Anaheim*, 95 F.3d 30 (9th Cir. 1996), *vacated and remanded*, 520 U.S. 1261 (1997). Our decision was vacated by the Supreme Court in light of *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997), and the case was remanded. We must now determine whether the United States can join this action as a co-plaintiff and whether such belated joinder by the United States retroactively cures any jurisdictional defect that previously existed.

### I.

The impetus of this case was a credit union seminar held in Anaheim in November of 1993. Federal credit union employees who attended the seminar stayed at the Disneyland Hotel in Anaheim and were assessed a transient occupancy tax pursuant to the Anaheim Municipal Code. The tax was 13% of the room rate charged by the hotel. The League responded to the tax by filing this lawsuit alleging that the transient tax as assessed against the credit union employees attending the seminar violated 12 U.S.C. § 1768. The district court granted the League summary judgment and we affirmed.

We noted that federal credit unions enjoy broad immunity from local taxation under Section 1768 and concluded that "[b]ecause the federal credit unions' employees were attending to credit union business while staying at the Disneyland Hotel in Anaheim, they were 'constituent parts' of the credit union and immune from Anaheim's transient occupancy tax under Section 1768." *California Credit Union League*, 95 F.3d at 32. We did not, however, address the issue of whether the Tax Injunction Act, 28 U.S.C. § 1341, prohibited the League from suing Anaheim in federal court without the United States joined as a co-plaintiff.

The Supreme Court vacated our decision in light of its decision in *Arkansas v. Farm Credit Services of Central Arkansas* and remanded. *See City of Anaheim v. Cal. Credit Union League*, 520 U.S. 1261. In *Farm Credit Services*, the Supreme Court held that the Tax Injunction Act prevented Production Credit Associations—federally chartered corporate financial institutions that make loans to farmers—from suing a state in federal court to enjoin state taxation unless the United States was joined as a plaintiff. *See id.* at 824. The Court reasoned that because Production Credit Associations do not exercise the same powers that departments and regulatory agencies of the United States exercise the "instrumentality status" of Production Credit Associations "does not in and of itself entitle an entity to the same exemption the United States has under the Tax Injunction Act." *Id.* at 882. Accordingly, the Court dismissed the Production Credit Association's suit against the State of Arkansas without reaching the merits of the tax dispute.

After the Supreme Court vacated our decision in this case in light of *Farm Credit Services*, we received a joint motion from the League and the United States to join the United States as co-plaintiff. Although the joint motion adequately discussed the joinder issue, the motion did not discuss whether the joinder of the United States as co-plaintiff would operate *nunc pro tunc* to "cure" the jurisdictional defect that

existed in the prior proceedings. We, therefore, ordered the parties to file supplemental letter briefs addressing the issue of "whether joinder of the United States will 'cure' the jurisdictional defects that existed before the district court."

We have received the parties' supplemental briefs and now address whether the United States can join this action as a co-plaintiff and whether such belated joinder by the United States retroactively cures any jurisdictional defect that previously existed. We conclude that the United States can join this action as a co-plaintiff and that the United States belated joinder retroactively cures any jurisdictional defect that previously existed. We, therefore, reaffirm the district court's judgment in favor of the League for the reasons stated in our prior opinion.

## II.

[1] Rule 21 of the Federal Rules of Civil Procedure provides in relevant part that "[p]arties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." Fed. R. Civ. P. 21. Although Rule 21 is not directly applicable to the courts of appeals, courts have consistently recognized that appellate courts can join parties pursuant to Rule 21 when a case is pending on appeal. *See Mullaney v. Anderson*, 342 U.S. 415, 417 (1952); *Spangler v. Pasadena City Bd. of Ed.*, 552 F.2d 1326, 1329 (9th Cir. 1977). Thus, a party may join a lawsuit on appeal under Rule 21 when the party seeking joinder requests the same remedy as the original party and offers the same reasons for that remedy and earlier joinder would not have affected the course of the litigation. *See Spangler*, 552 F.2d at 1328 (citing *Rogers v. Paul*, 382 U.S. 198, 199 (1965); *Mullaney*, 342 U.S. at 417. The United States can join this lawsuit because it is requesting the same remedy as the League and offers the same reasons for that remedy and because earlier joinder by the United States would not have affected the course of this litigation.

[2] The United States is requesting the same relief as the League because the amicus brief filed by the United States sought a declaratory judgment that Anaheim's transient occupancy tax impermissibly taxed the federal credit unions. To support its argument, the United States, like the League, cited 12 U.S.C. § 1768 and argued that the transient occupancy tax fell upon the various credit unions rather than the individual employees. The joinder of the United States at an earlier stage of this case would not have affected the course of this litigation because the district court and this court would have reached the same conclusions and granted the League the declaratory judgment it sought if the United States had participated in earlier proceedings. The final factor that supports joinder of the United States is the fact that Anaheim has no objection to this court granting the joint motion filed by the League and the United States. We, therefore, grant the joint motion to join the United States as co-plaintiff because the position of the United States is consistent with the position of the League and does not alter these proceedings and because the League has no objection to the United States joining this case as a plaintiff.

## III.

[3] Joinder of the United States as a co-plaintiff in this case does not, in and of itself, resolve the issue before us on remand because we must determine whether the joinder of the United States at the appellate level retroactively cures the jurisdictional defect identified by *Farm Credit Services*. The League and the United States argue that the belated joinder of the United States retroactively cures any jurisdictional defect because a retroactive cure will serve judicial economy and the interests of justice by avoiding a remand to the district court that will result in a pre-ordained judgment. Anaheim argues that federal subject matter jurisdiction must exist at the time the action is commenced and that the League cannot retroactively cure a jurisdictional defect that existed when the action was commenced through post-complaint conduct (i.e., the

joinder of the United States in this court). We conclude that this is one of the rare cases where a jurisdictional defect can be retroactively cured at the appellate level.

In *Mullaney v. Anderson*, a fisherman's union and its secretary-treasurer sued the Alaska tax commissioner challenging a licensing scheme adopted by the Territorial Legislature of Alaska. The tax commissioner argued for the first time in the Supreme Court that the union and its secretary-treasurer did not have standing to maintain the lawsuit. To cure any jurisdictional defect, the union and its secretary-treasurer moved to join two of its members as plaintiffs. Relying on Rule 21 of the Federal Rules of Civil Procedure, the Court granted the union's motion even though it recognized that such joinder was rare. *See Mullaney*, 342 U.S. at 417. The Court reasoned that "[t]o dismiss the present petition and require the new plaintiffs to start over in the District Court would entail needless waste and runs contrary to effective judicial administration—the more so since, with the silent concurrence of the defendant, the original plaintiffs were deemed proper parties below." *Id. Mullaney*, therefore, instructs that appellate courts may join a party as a plaintiff to cure a jurisdictional defect when the joinder will promote judicial economy and not prejudice the defendant.

The Court reaffirmed *Mullaney* in *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989), when it concluded that the courts of appeals could dismiss a dispensable non-diverse party to perfect diversity jurisdiction. The Court noted that appellate courts have consistently relied on Rule 21 and *Mullaney* to cure jurisdictional defects and stated:

> We decline to disturb that deeply rooted understanding of appellate power, particularly when requiring dismissal after years of litigation would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention. Appellate-level amendments to correct jurisdic-

> tional defects may not be the most intellectually satisfying approach to the spoiler problem, but . . . because law is an instrument of governance rather than a hymn to intellectual beauty, some consideration must be given to practicalities.

*Id.* at 836-37 (citations and internal quotations omitted). The Court went on to conclude that the Seventh Circuit did not err when it dismissed a non-diverse defendant on appeal to perfect jurisdiction because, without the dismissal of the non-diverse defendant, the plaintiff would have simply re-filed its complaint against the diverse defendants, submitted discovery materials already obtained, and proceeded to a preordained judgment. *See id.* at 837.

Although a plurality of the Supreme Court has questioned the validity of *Mullaney* and *Newman-Green*, *see Lujan v. Defenders of Wildlife*, 504 U.S. 555, 569-70 n.4 (1992) ("It cannot be that, by later participating in the suit, the State Department and AID retroactively created a redressability (and hence a jurisdiction) that did not exist at the outset.") (Scalia, J., plurality), *Mullaney* and *Newman-Green* stand on firm ground. A majority of the Court has never questioned let alone overruled *Mullaney* or *Newman-Green* and, since *Lujan*, a unanimous Court has relied, in part, on *Newman-Green* to conclude that "a district court's error in failing to remand a case improperly removed is not fatal to the ensuing adjudication if the federal jurisdictional requirements are met at the time judgment is entered." *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 64 (1996).

In *Caterpillar*, a defendant removed a state court action to federal court believing that a settlement between the plaintiff and the non-diverse defendant created complete diversity. *See id.* at 65. The plaintiff filed a motion to remand arguing that diversity jurisdiction did not exist because his insurer had not settled its subrogation claim against the non-diverse defendant. *See id.* The district court erroneously denied the plain-

tiff's motion to remand and the case proceeded to trial where a unanimous verdict was returned in favor of the diverse defendant. Before trial, however, the plaintiff's insurer settled its claim against the non-diverse defendant yielding complete diversity. *See id.* at 66-67. The plaintiff argued that the district court's judgment in favor of the diverse defendant had to be vacated because the district court lacked subject matter jurisdiction at the time of removal. Citing *Newman-Green*, the Court recognized the merit of the plaintiff's argument but concluded that the plaintiff's argument was trumped by the fact that "once a case has been tried in federal court . . . considerations or finality, efficiency, and economy become overwhelming." *Id.* at 75. *Caterpillar*, therefore, reinforces the rule that technical jurisdictional defects can be outweighed by other jurisprudential concerns.

[4] Under *Mullaney* and *Newman-Green*, the joinder of the United States as a plaintiff in this case has retroactively cured the jurisdictional defect identified by *Farm Credit Services*. If we were to remand this case with instructions to dismiss or to have the United States litigate the merits of the tax exemption issue, the United States and the League, as co-plaintiffs, would simply rely on the League's original complaint against Anaheim, submit the same materials that the League already filed in the district court, and receive a preordained judgment in their favor. The United States and the League "should not be compelled to jump through these judicial hoops merely for the sake of hypertechnical jurisdictional purity," *Newman-Green*, 490 U.S. at 837, because judicial economy and considerations of practicalities outweigh any concern we have regarding jurisdictional purity. Moreover, our refusal to remand this case for meaningless proceedings in the district court can in no way prejudice Anaheim because Anaheim already received a full and fair opportunity to litigate the merits of this case and it never expressed any concern that the Tax Injunction Act barred the League's suit. *See Mullaney*, 342 U.S. at 417. Anaheim cannot now rely on a technical jurisdictional issue simply because it lost on the merits. This is espe-

cially true since Anaheim never even opposed the joint motion to the join the United States as a co-plaintiff.

Anaheim argues that *Newman-Green* is distinguishable because in that case the court of appeals dismissed a dispensable party to cure a jurisdictional defect while in this case we are joining an indispensable party to cure a jurisdictional defect. This is a distinction without a difference. In both instances, the appellate court is bringing the proper parties before it to cure a jurisdictional defect and does so to prevent needless judicial proceedings without any resulting prejudice to the remaining parties. Morever, even if Anaheim could distinguish this case from *Newman-Green*, it would be to no avail because *Mullaney* demonstrates that an appellate court can join parties to cure a jurisdictional defect just as an appellate court can dismiss parties to cure a jurisdictional defect. *See Mullaney*, 342 U.S. at 417.

Anaheim also argues that the joinder of the United States does not cure the jurisdictional defect that existed in this case because jurisdiction must exist at the time the action is commenced. This argument is misplaced because *Mullaney* and *Newman-Green* represent an exception to the general rule that jurisdiction must exist at the time the action is commenced. *See Newman-Green*, 490 U.S. at 830 ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed. Like most general principles, however, this one is susceptible to exceptions . . . ."). Accordingly, because this case falls squarely under the exception outlined in *Mullaney* and *Newman-Green*, Anaheim's recitation of the general that jurisdiction must exist at the time the action is commenced is misplaced and unconvincing. We, therefore, conclude that the joinder of the United States as a plaintiff in this case has retroactively cured the jurisdictional defect identified by *Farm Credit Services*.

## IV.

We recognize that our authority to join a party to cure a jurisdictional defect must be "exercised sparingly," *Newman-*

*Green*, 490 U.S. at 837; *see also Mullaney*, 342 U.S. at 417 ("Rule 21 will rarely come into play at this stage of a litigation."), but this case represents an extraordinary situation where a retroactive cure of a jurisdictional defect will promote the interests of justice without any resulting prejudice to the parties. Accordingly, we **GRANT** the joint motion to join the United States as co-plaintiff and **AFFIRM** the district court's award of summary judgment in favor of the League for the reasons set forth in our prior opinion.

# APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**FILED**
NOV 22, 1994
Clerk, U.S. District Court
Central District of California
By Deputy

CALIFORNIA CREDIT UNION LEAGUE, et al.
Plaintiffs,
v.
CITY OF ANAHEIM, et al.
Defendants.

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CV 94-5991 ER (GHKY)

ORDER DENYING DEFENDANTS' MOTION TO DISMISS AND GRANTING SUMMARY JUDGMENT IN FAVOR OF PLAINTIFFS

The parties came before this Court on November 14, 1994. The Court, having read and considered the moving and opposing papers and arguments of counsel, and for the reasons stated in open court, HEREBY ORDERS:

(1) that defendants' Motion to Dismiss for Failure to State a Claim is DENIED; and
(2) that summary judgment is GRANTED in favor of the plaintiffs,

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: November 22, 1994

/s/ EDWARD RAFEEDIE
EDWARD RAFEEDIE
United States District Judge

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d).

# APPENDIX C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

**FILED**
Jan 9, 1995
Clerk, U.S. District Court
Central District of California
By Deputy

CALIFORNIA CREDIT UNION LEAGUE,
Plaintiff,
v.
CITY OF ANAHEIM, et al.,
Defendants.

---

CV 94-5991 ER

JUDGMENT

On November 14, 1994, this Court granted Plaintiff's Motion for Summary Judgment in this action. Accordingly, judgment in this case is hereby entered in favor of the Plaintiff in this case, and Plaintiff shall have its costs.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: January 9, 1995

/s/ EDWARD RAFEEDIE
EDWARD RAFEEDIE
United States District Court Judge

# APPENDIX D

## 12 USCS § 1768

### §1768. Taxation

The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed. Nothing herein contained shall prevent holdings in any Federal credit union organized hereunder from being included in the valuation of the personal property of the owners or holdings thereof in assessing taxes imposed by authority of the State or political subdivision thereof in which the Federal credit union is located; but the duty or burden of collecting or enforcing the payment of such a tax shall not be imposed upon any such Federal credit union and the tax shall not exceed the rate of taxes imposed upon holdings in domestic credit unions.

(June 26, 1934, ch 750, Title I, § 122 [23] [18], 48 Stat. 1222; Dec. 6, 1937, ch 3, § 4, 51 Stat. 4; Sept. 22, 1959, P. L. 86-354, § 1, 73 Stat. 637; Oct. 19, 1970, P. L. 91-468, § 1(2), 84 Stat. 994.)

# APPENDIX E

# CITY OF ANAHEIM

## TRANSIENT OCCUPANCY TAX
## Chapter 2.12

Sections:


| | |
|---|---|
| 2.12.000 | Short title. |
| 2.12.005 | Definitions. |
| 2.12.010 | Transient occupancy tax imposed. |
| 2.12.015 | Exemptions. |
| 2.12.020 | Operator's collection duties. |
| 2.12.025 | Rules and regulations and interpretations. |
| 2.12.030 | Reporting and remitting. |
| 2.12.040 | Taxes to be held in trust. |
| 2.12.050 | Delinquent tax payments — Interest and penalties. |
| 2.12.060 | Failure to collect and report tax — Determination of tax by city auditor — Appeal. |
| 2.12.075 | Payment under protest required. |
| 2.12.080 | Statement of tax not conclusive on city. |
| 2.12.090 | Transient occupancy tax a debt — Civil action. |
| 2.12.095 | Duty and liability of operator's successor. |
| 2.12.100 | Remedies cumulative. |
| 2.12.110 | Reimbursement to qualifying organizations. |


### 2.12.000 SHORT TITLE.

This chapter shall be known and cited as the Transient Occupancy Tax Code. (Ord. 5305 § 1 (part); May 27, 1992.)

## 2.12.005 DEFINITIONS.

For purposes of this chapter, the following words, terms, phrases, and the derivations and variants thereof, shall have the meanings given herein:

.010 "Anaheim" or "City" means the City of Anaheim.

.020 "City Auditor" means the Audit Manager of the City.

.025 "Fiscal Year" means the period commencing July 1 of one calendar year through June 30 of the immediately subsequent calendar year.

.030 "Homeless person" means any person who lived or resided in Anaheim immediately prior to being provided shelter in a hotel by a Qualifying Nonprofit Service Organization.

.040 "Hotel" means any structure or portion thereof, which is occupied or intended or designed for occupancy by transients for dwelling, lodging, or sleeping purposes, including, without limitation, any hotel, bachelor hotel, lodging house, rooming house, bed and breakfast inn, apartment house, dormitory, vacation ownership resort, public or private club, mobilehome or house trailer at a fixed location, or other similar structure or portion thereof, and shall further include any space, lot, area or site in any trailer court, camp, park, or lot which is occupied or intended or designed for occupancy by a tent, trailer, recreational vehicle, mobilehome, motorhome, or other similar conveyance, for dwelling, lodging or sleeping purposes.

.050 "Operator" means any person, corporation, entity, or partnership which is the proprietor of the hotel, whether in the capacity of owner, lessee, sublessee, mortgagee in possession, debtor in possession, licensee or any other capacity. Where the operator performs its functions through a managing agent of any type or character other than as an employee, the managing agent

shall also be deemed an operator and shall have the same duties and liabilities as its principal. Compliance with the provisions of this chapter by either the principal or managing agent shall constitute compliance by both. For purposes of the notice and appeal provisions of this chapter only, "operator" shall also include any managing employee or employee in charge of the hotel.

.060 "Qualifying Nonprofit Service Organization" means any nonprofit service organization which (a) is member of the Anaheim Human Services Network and (b) directly pays the cost of sheltering homeless persons in a hotel and (c) does not directly or indirectly further any religious purpose by providing such shelter.

.070 "Qualifying Rental Agreement" means and is limited to a written contract signed by both the landlord and tenant, legally enforceable by either party, for a rental period of not less than thirty-one consecutive days. "Qualifying Rental Agreement" shall expressly include: (1) any agreement regardless of length of the rental term which is terminated for any reason by either party or by mutual consent prior to the thirty-first consecutive day of the tenancy, or (2) any agreement regardless of the length of the rental term which is for occupancy of space in an establishment which is authorized as a "hotel" or "motel" pursuant to the terms of Title 18 (Zoning) of this Code, or (3) any agreement regardless of the length of the rental term for occupancy of space by any recreational vehicle as defined in Section 799.24 of the Civil Code of the State of California or any successor provision thereto, or (4) any agreement which would be unlawful or constitute a violation of law.

.080 "Rent" means the consideration charged by an operator for accommodations, including without limitation any (1) unrefunded advance rental deposits or (2) separate charges levied for items or services which are part of such accommodations including, but not limited

to, furniture, fixtures, appliances, linens, towels, non-coin-operated safes, and maid service. "Rent" shall not include any charge, billing, or account or portion thereof which the operator finds to be worthless or uncollectible and charged off for tax purposes. If any such worthless or uncollectible rent is thereafter collected, the amount shall be considered rent in the month collected and the tax collected shall be included in the next monthly payment to Anaheim by the operator.

.090 "Tax" (where such term is not capitalized) means the amounts imposed pursuant to Section 2.12.010 of this chapter, "Tax" (where such term is capitalized) means 1) the tax and 2) any applicable interest and penalties imposed by this chapter and 3) any amount collected by an operator under a representation that it is a tax which is not refunded in accordance with this chapter.

.100 "Transient" means any person who exercises occupancy, or is entitled to occupancy, of any room, space, lot area or site in any hotel by reason of concession, permit, right of access, license or other agreement whether written or oral. Any such person shall be deemed to be a transient until the thirty-first consecutive day of such occupancy and the tax shall be due upon all rent collected or accruing prior to said thirty-first consecutive day unless the occupancy is pursuant to a Qualifying Rental Agreement. (Ord. 5305 § 1 (part); May 27, 1992.)

## 2.12.010 TRANSIENT OCCUPANCY TAX IMPOSED.

.010 For the privilege of occupancy in any hotel, each transient is subject to and shall pay a tax in the amount of thirteen percent of the rent.

.020 Notwithstanding subsection .010 above, where an operator has entered into a binding written contract

with any party (the "rate contract") which rate contract (i) was entered into by all parties thereto and in full force and effect prior to April 7, 1992, (ii) agreed to provide occupancy in a hotel to transients, on whose behalf of such parties have contracted, at an agreed upon rate or price specified in said contract (the "contract price") which contract price expressly includes applicable tax imposed pursuant to this chapter, and (iii) said tax which was expressly included in said contract did not exceed the applicable tax in effect pursuant to this chapter on April 7, 1992, the following provision shall apply with regard to the amount of tax imposed pursuant to this chapter upon any transient for the privilege of occupancy in any hotel under the terms of such rate contract for the period commencing on July 1, 1992, and ending on the last date of occupancy pursuant to the terms of said rate contract, or December 31, 1992, whichever occurs earlier:

> For the privilege of occupancy of space in a hotel, each transient is subject to and shall pay a tax in the amount of eleven and six-tenths percent (11.6%) of the rent.

The License Collector shall issue forms and regulations to implement the provisions of this subsection.

.030 Notwithstanding subsection .010 above, where any travel company, travel broker, travel agent or any other person or entity (the "agent") has entered into a binding written contract with any operator (the "agency contract"), which agency contract was entered into by all parties thereto and in full force and effect prior to April 7, 1992, and which agency contract provides that occupancy in such operator's hotel (the "hotel")' shall be provided to transients on whose behalf the agent and the operator have contracted at a fixed rate (the "fixed rate") (regardless of whether said fixed rate includes or excludes taxes imposed pursuant to this chapter and

regardless of whether said agency contract provides that such taxes are subject to increase, adjustment or change) and where, based upon such agency contract and prior to April 7, 1992, the agent either (1) entered into a binding written contract with any transient, any agent of any transient, or any other person or entity, agreeing to provide or arrange to provide occupancy in such hotel to any transient at a fixed price which included any taxes imposed pursuant to this chapter and which fixed price is collected by the agent and forwarded in whole or part to the operator as rent, or (2) advertised to the general public that such agent would provide or arrange to provide occupancy in such hotel at a fixed price which included any taxes imposed pursuant to this chapter and which fixed price is collected by the agent and forwarded in whole or part to the operator as rent, then the following provision shall apply with regard to the amount of tax imposed pursuant to this chapter upon any such rent received by the operator from such agent for the privilege of occupancy in such hotel by any transient (on whose behalf the agent and the operator have contracted) for the occupancy period commencing July 1, 1992 and ending on the last date of occupancy pursuant to the terms of said agency contract, or at midnight on December 31, 1992, whichever occurs earlier:

> For the privilege of occupancy of space in a hotel, each transient is subject to and shall pay a tax in the amount of eleven and six-tenths percent (11.6%) of the rent.

**2.12.015 EXEMPTIONS.**

No tax shall be imposed upon any person as to whom, or any occupancy as to which, it is beyond the power of Anaheim to impose the tax. (Ord. 5305 § 1 (part); May 27, 1992.)

## 2.12.020 OPERATOR'S COLLECTION DUTIES.

.010 Each operator shall collect the tax to the same extent and at the same time a the rent is collected from every transient. The amount of the rent and the tax thereon shall be separately stated from all other amounts on all receipts and books of record of the hotel, and each transient shall be tendered a receipt for payment from the operator with rent and tax separately stated thereon. No operator shall advertise or state in any manner, directly or indirectly, that the tax or any part thereof will be assumed or absorbed by the operator or that the tax will not be added to the rent or that, if added, any part of the tax will be refunded except in the manner hereinafter provided. Notwithstanding the foregoing provision of this subsection, nothing contained herein shall require the operator to separately state the rent and the tax thereon on receipts and books of record or prohibit the operator from advertising or stating that the tax will be assumed or absorbed by the operator or that such tax will not be added to the rent, provided such room accommodations constitute a portion of a collective group of services, privileges, entitlement or benefits (hereinafter "benefits") which benefits include, at a minimum, room accommodations and food and beverage services or room accommodations and at least one other benefit having an ascertainable fair market value (hereinafter "special package") offered for one fixed charge (hereinafter "special package rate").

.011 In the event the operator fails to separately state the rent and tax from other amounts on all receipts and books of record, the operator shall file with the License Collector a statement of each special package rate on a form (hereinafter "Special Package Form") provided by the License Collector. The Special Package Form shall include the special package rate, and an

itemization of the values of the items included, including, at a minimum, the rent, tax, and any other item. The operator must submit documentation to substantiate the claimed fair market value of individual items included other than rent and tax. The License Collector shall mark the date of receipt on the Special Package Form and review the submitted information to determine if sufficient information is provided to verify that the numbers are mathematically correct and complies with this chapter. If the package meets the foregoing requirements, the License Collector shall assign a unique number to the Special Package Form and return a copy to the operator within fourteen City business days of receipt. The operator may use the assigned unique number or may assign the operator's unique name/number to each package and notify the License Collector to imprint the name/number on the Special Package Form. This unique name/number must appear on all receipts and books of record whenever the package is sold. If the package fails to meet the requirements of this Subsection, the License Collector will advise the operator of any required changes within fourteen City business days. The operator must either make the required changes and resubmit the Special Package Form or comply with subsection 2.12.020.010. A new Special Package form must be submitted in the event of any change in the special package rate or the specified rate (subsection 2.12.020.013), or other items in the special package which exceeds ten percent and for any new special package(s) offered/used. Any change of items within the special package constitutes a new special package. The effective date of the special package rate shall be the date of receipt by the License Collector if the package is removed.

.012 No Special Package Form shall be accepted for filing unless accompanied by a filing fee in the amount established by resolution of the City Council.

.013 As to any package sold by the operator for which the License Collector has approved the package and assigned the unique number, the tax shall apply only to the amount of rent identified in the Special Package Form (hereinafter "specified rate") until such time as the License Collector shall inform the operator that the approval is revoked.

.014 In the event an operator fails to comply with subsection 2.12.020.010 and also fails to file a Special Package Form and obtain approval of a specified rate pursuant to subsection 2.12.020.011, the portion of the special package rate attributable to the room accommodations for purposes of determining the tax (hereinafter "imputed rate") shall be deemed the lesser of (a) the amount collected for the total special package or (b) an amount equal to the median average double occupancy room rate for such accommodations as posted in such room pursuant to the requirements of Section 1863 of the Civil Code (or any successor section). The burden to prove such posted room rates shall be upon the operator. In the event the operator fails to present satisfactory proof of such rates, such posted rates shall be deemed the posted rates in effect at the time of the audit.

.015 Notwithstanding subsections 2.12.020.011, 2.12.020.013, or 2.12.020.014, if any audit reveals that the gross income to the operator attributable to the accommodations portion of such special package (hereinafter "audited rate") is more than ten percent greater than the specified rate, the rent for tax purposes shall be the audited rate. In the event subsection 2.12.020.014 applies and the audited rate is greater than the imputed rate, the rent for tax purposes shall be the audited rate. The audited rate shall be determined by an audit of a sample of the special packages sold by the operator within an individual special package category. The audited rate shall be the amount of the special

package rate remaining after deducting the fair market value of each of the benefits included in the special package rate other than room accommodations and room tax. Where more than one type of special package was offered within the audit period, each special package shall be audited separately for purposes of determining the applicable audited rate. Credits or offsets shall not be allowed between different special packages.

.020 Any amount charged and collected by the operator from any transient beyond the period for which the tax is imposed, which amount is in excess of the rent theretofore charged the transient for the same accommodations and upon which rent tax was imposed and collected, shall be conclusively deemed collected under the representation by the operator that such excess amount was tax. If the operator gives such person written notice prior to the accrual of the obligation therefor that such excess amount constitutes an increase in the rental rate this subsection shall not apply. The burden to prove such notice shall be upon the operator.

.030 Whenever an operator who has collected any sum under the representation that it was tax (which sum was not required to be collected as tax) remits said sum to Anaheim and thereafter refunds such sum in whole or part, such operator may take the amount of such refund as a credit against future transient taxes only upon submitting to the License Collector a statement under penalty of perjury specifying the reasons for the credit and proof of payment of such refund.

.040 Nothing contained in this chapter shall require the refund by Anaheim to any person of such sum collected by the operator and remitted to Anaheim even where such sum was not otherwise required to be collected and remitted.

.050 Nothing contained in this chapter shall be deemed to authorize as a credit against tax any amount paid by the operator to any tour promoter, travel agent,

or third party other than the transient. Travel agent commissions are an expense of the operator and may not be deducted from the rent. (Ord. 5305 § 1 (part); May 27, 1992.)

## 2.12.025 RULES AND REGULATIONS AND INTERPRETATIONS.

The License Collector may promulgate rules and regulations consistent with the provisions of this chapter as may be necessary or desirable to aid in the enforcement and administration of this chapter. Any such rule or regulation which may affect the amount of the Tax or tax owed Anaheim shall be subject to approval of the City Council. Said rules and regulations shall be filed in the Office of the License Collector and maintained in an orderly and readily accessible manner. The burden to secure and comply with the rules and regulations shall be upon the operator. (Ord. 5305 § 1 (part); May 27, 1992.)

## 2.12.030 REPORTING AND REMITTING.

.010 Each operator shall, on or before the close of City business on the last City business day of each month (hereinafter "due date"), file a return with the License Collector on forms provided by the License Collector stating the total rents charged and the amount of tax collected during the immediately preceding calendar month. The full amount of the tax (minus any authorized credits) shall be remitted to the License Collector.

.020 Taxes are paid only upon receipt of both the tax return and the tax by License Collector. Failure of the operator to submit and the License Collector to receive both the completed return and payment on or before the due date constitutes non-payment. (Ord. 5305 § 1 (part); May 27, 1992.)

## 2.12.040 TAXES TO BE HELD IN TRUST.

.010 All taxes collected by the operator shall be held in trust by such operator for the account of Anaheim until payment thereof is made to the License Collector.

.020 Upon non-payment by an operator, or when the City Auditor makes a determination pursuant to Section 2.12.060, the License Collector shall issue a Jeopardy Determination to require the operator to furnish additional information or provide adequate security as necessary to ensure collection of any Taxes due or to become due, and to remit taxes on a daily or weekly basis. The operator shall thereafter report and remit all taxes due under the terms and conditions prescribed by the License Collector. The License Collector shall cancel the Jeopardy Determination once timely accounting and remittance procedures have been established and the operator is satisfying all obligations imposed by law pertaining to the Tax. (Ord. 5305 § 1 (part); May 27, 1992.)

## 2.12.050 DELINQUENT TAX PAYMENTS — INTEREST AND PENALTIES.

.010 Notwithstanding any other provisions hereof, upon non-payment, interest equal to one and one-half percent thereof per month calculated from the first day immediately following the due date to the date of payment shall be added to the tax. Interest may not be waived.

.020 Notwithstanding any other provisions hereof, upon non-payment, a penalty of ten percent for each month, or portion thereof, said payment is overdue, shall be added by the License Collector on the first day immediately following the due date; provided, however, that the amount of such penalty shall not exceed fifty percent of the tax. Penalties may not be waived.

.030 In the event of payment of the tax and non-payment of the interest and/or penalties, interest at the rate set forth in subsection 2.12.050.010 shall accrue upon the amount of the unpaid interest and penalties until the date of payment.

.040 In the event the Tax becomes final under Section 2.12.060, interest and penalties at the rate set forth in Section 2.12.050 shall accrue upon the amount of unpaid Tax until the date of payment of the full amount of Tax. (Ord. 5305 § 1 (part); May 27, 1992.)

## 2.12.060 FAILURE TO COLLECT AND REPORT TAX — DETERMINATION OF TAX BY CITY AUDITOR — APPEAL.

.010 If any operator shall fail or refuse to collect said tax and to make, within the time permitted, any report and remittance of tax, or any portion thereof, the City Auditor shall proceed in such manner as the City Auditor may deem best to obtain facts and information on which to base an estimate of the tax. The City Auditor shall proceed to determine and assess the Tax against such operator. The City Auditor shall give notice of the amount so assessed by serving it personally or by depositing it in the United States mail, postage prepaid, addressed to the operator at the operator's last known address.

.020 An operator who contests the amount assessed may, within ten days after the serving or mailing of such notice, make an Application for Hearing to the License Collector. The Application for Hearing shall specify the basis of the appeal and amount of Tax contested. The License Collector may request additional information pertaining to the appeal which information must be submitted prior to scheduling a hearing on the appeal. If Application for Hearing is not made within the time

prescribed, the Tax assessed shall be final and conclusive and immediately due and payable.

.030 If Application for Hearing is timely made, a Hearing Officer shall be appointed by the License Collector to conduct a hearing on and limited to the issues set forth in the Application for Hearing. The Hearing Officer shall give not less than fifteen days' written notice to the operator to show cause at a time and placed fixed in said notice why the amount assessed should not be fixed for such Tax. At the hearing, the operator may appear and offer evidence why the Tax assessed should not be so fixed. A rebuttable presumption shall exist at said hearing that the amount of Tax assessed is correct and the burden of proof shall be upon the operator.

.040 After the hearing, the hearing, the Hearing Officer shall determine the proper amount of the Tax and shall thereafter give notice to the operator and the License Collector of such determination. The amount determined to be due shall be due and payable fifteen days from the date of service of said written notice.

.050 The Hearing Officer may be an employee of Anaheim; provided, however, that upon the agreement of the operator to pay the costs associated with the hearing and the deposit of sufficient funds to cover said costs, the License Collector shall appoint a Hearing Officer, acceptable to both the operator and the City Attorney, who is not an employee of Anaheim.

.060 Notwithstanding the provisions of Section 1.12.110 of this Code, the decision of the Hearing Officer shall be final and conclusive and shall be the final administrative procedure available to the operator or to Anaheim. (Ord. 5305 § 1 (part); May 27, 1992.)

## 2.12.075 PAYMENT UNDER PROTEST REQUIRED.

Notwithstanding any provision to the contrary, any operator tendering payment of the Tax, or any portion thereof, shall for all purposes thereafter be precluded and barred from appealing, contesting or otherwise challenging the validity of such Tax pursuant to any procedure available in this chapter or any other legal remedy, unless the payment is made under written protest. Written protest shall be made only by the following methods:

.010 A written notation set forth on the check, money order or negotiable instrument by which payment is tendered, that the payment is made under protest; or,

.020 A written notice that the payment is made under protest delivered to the License Collector at the time of payment of the Tax. (Ord. 5305 § 1 (part); May 27, 1992.)

# APPENDIX F

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

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HONORABLE EDWARD RAFEEDIE, JUDGE PRESIDING

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CALIFORNIA CREDIT UNION LEAGUE, ET AL.,
Plaintiffs,
vs.
CITY OF ANAHEIM, ET AL.,
Defendants.

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CASE NO. CV-94-5991-ER

REPORTER'S TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

**MONDAY, NOVEMBER 14, 1994**

MARY TUCKER, CSR 9308
OFFICIAL COURT REPORTER
429-D U.S. COURTHOUSE
312 NORTH SPRING STREET
LOS ANGELES, CALIF. 90012
213/687-0530

APPEARANCES:

FOR THE PLAINTIFF:

OTT, MARQUEZ & HOROWITZ
THOMAS H. OTT
700 NORTH CENTRAL AVENUE
SUITE 875
GLENDALE, CALIFORNIA 91203

FOR THE DEFENDANT:

MOSES W. JOHNSON IV
DEPUTY CITY ATTORNEY
ANAHEIM CIVIC CENTER
200 S. ANAHEIM BOULEVARD
SUITE 356
ANAHEIM, CALIFORNIA 92805

LOS ANGELES, CALIFORNIA;
MONDAY, NOVEMBER 14, 1994
(10:00 A.M.)

THE CLERK: Civil 94-5991, California Credit Union League, And Others v. The City of Anaheim, And Others.

Counsel, Please state your names for the record, please.

MR. OTT: Thomas OTT, O-T-T, your Honor, on behalf of the plaintiff California Credit Union League.

MR. JOHNSON: Good Morning, your Honor. Moses Johnson, J-O-H-N-S-O-N, Deputy City Attorney, on behalf of defendant City of Anaheim.

THE COURT: Well, we are dealing here with whether or not the City of Anaheim has the lawful authority to impose an occupancy tax upon an employee of a federal credit union who is occupying a hotel room in the city on business for the credit union.

The plaintiff's representing the union, California Credit Union League, has alleged that Anaheim is imposing an unlawful transient occupancy tax upon federal credit union employees.

The plaintiff argues that the employees are exempt from this taxation pursuant to Title 12, USC 1768; and the defendant's argue that 12 USC 1768 only exempts the credit union and not the credit union's employees from the tax.

The court has read and considered the papers that have been filed in the case. It is the court's tentative view that the defendant's motion to dismiss for failure to state a claim with prejudice should be denied, and that the plaintiff's motion for summary judgment should be granted.

I think that both of these parties have agreed this is appropriate for summary judgment; is that correct?

MR. JOHNSON: That is correct, your Honor.

MR. OTT: Yes.

THE COURT: It was not initially filed as a summary judgment.

In the opposition the respondent asked for that. In the reply you conceded that that would be appropriate; is that right?

MR. JOHNSON: That is correct, your Honor.

THE COURT: Well, the court basically believes the motion of the defendant should be denied for the following reasons: The law is that to resist the state or any governmental entity's taxing power, the private taxpayer must actually stand in the government's shoes. This comes from the Supreme Court in the case of United States v. New Mexico.

The Federal Credit Union Employees occupy a space in the hotel under the facts of this case because the government as an entity cannot physically occupy. The only way the credit union can occupy the hotel room is because one of it's employees does. There is no way for the credit union to occupy a hotel room. Their interest in renting the room is not separate from their employment interest. They would probably be sleeping in their own beds, but for the fact that they were sent to this hotel on business for their employer.

Therefore, they do stand in the shoes of the government, and the incident of the tax should fall on the government as their employer, not them as employees.

For the City to contend that only the Entity itself is exempt from taxation is somewhat farfetched. The entity does not occupy hotel rooms, only it's employees do.

Now, the plaintiff's motion for summary judgment, in the view of the court, should be granted for the following reasons: First, matters of statutory interpretation are properly determinable at the summary judgment stage. The only fact that is in dispute is whether the City of Anaheim levies the tax against the employees or the Federal Credit Union. This is not a material fact, but an interpretation of the statutory law.

In the view of the court, the judgment is appropriate at this point and should be granted in favor of the plaintiff because the tax is levied against the federal credit union and not the personal employees when they are occupying the hotel on the employer's business.

Do you wish to be heard for the City?

MR. JOHNSON: Yes, your Honor.

I think one of the things that needs to be addressed if the court is going to grant the motion for summary judgment, is what proof is the hotel going to need to know that this employee is on Federal Credit Union business? Some of the exhibits attached to the complaint were a little contradictory.

THE COURT: That isn't what you have said in your papers. In your papers you said that the entity itself is exempt, not the employee. Now you are trying to change your position here a little bit.

MR. JOHNSON: What I'm concerned about, your Honor, is implementation of the court's ruling. How is the hotel going to know when they are looking at a person whether they are there on credit union's business or they are there on personal business?

THE COURT: They have the right to demand proof.

MR. JOHNSON: Okay.

THE COURT: I do this all the time when I travel. I file certificates of exemption that I am on government business at a hotel, which I do frequently go to other districts to sit. I sign a certificate of exemption. That's usually sufficient. But I would also have a designation designating me to sit in that district if they wanted additional proof.

So you are not challenging the right of the employees to obtain an exemption, but you are saying that they must offer more proof. And I think that that's within your province to say, "We will grant the exemption only upon proof of some kind that the employee is here on business for the employer."

You have the right to do that, and you have the right to satisfy yourself that that is the case.

MR. JOHNSON: That is one of the City's concerns, your Honor. But going to the merits, I would only say that all of the cases that I have cited to the court that dealt with transient occupancy tax, even though it dealt in situations where the employee was on some form of government business, all of those cases held that the tax was on the occupant of the room, the employer, irregardless of whether the employer advanced the payment.

THE COURT: Irregardless is not a word. I want to tell you the rest of that. Irregardless is not a word, regardless of what you may have heard.

(Laughter)

MR. JOHSON: I will take your word at it, your Honor.

The point I was trying to make, your Honor, is all of the cases that dealt specifically with the transient occupancy tax, not a sales tax, not a use tax, have all held that the tax fell upon the occupant, even when the employee was acting on behalf of the employer, acting on governmental business.

It is the question of whether the legal incident falls, and in those cases they all found it fell on the employee.

THE COURT: If the Employer paid the tax, as they did in this case, if the employer paid the occupancy tax, then it simply is tax on the employer, the federal agency. And it is always a body that's in the room that gets taxed when the bill is billed to the occupant, but the occupant submits a bill to — the federal Government is very laxed about this. They pay more taxes than they should.

I go many places where we pay the tax. Pay the occupancy tax and then the government reimburses. They don't have the mechanism to establish it. They leave it pretty much to the employee to find a way to do it. And many of these hotels and cities don't like it, and they don't make it easy for you. They throw up obstacles, and you just say, "Heck with it."

MR. OTT: Your Honor, could I just for clarification.

THE COURT: Yes.

MR. OTT: Not trying to go out of order here.

But the California Credit Union League has asked for a declaratory judgment which affects situations where the Federal Credit Union pays directly by invoice submitted to the Federal Credit Union for the traveling employee on Federal Credit Union business pays with corporate credit card. That we say constitutes direct payment by the Federal Credit Union entity.

We haven't even asked for a declaratory judgment in a reimbursement situation. Because giving the City the benefit of the doubt, we think that might be difficult to track.

THE COURT: The card is not enough unless the hotel is willing to accept it.

I have a government credit card, but I'm responsible for making the payments on it, not the government. It says U.S. Court. The agreement with the cardholder is that I am responsible for every charge incurred on that card. And it is certainly evidence where you use a government credit card that you are probably there on government business.

If you go to the Hilton Hotel on a government rate, they will always present you with a certificate of exemption, which you sign, and which authorizes them then not to charge the tax. I do that at Hilton Hotels when I go there. Not all hotels provide that service. Many of them will try to discourage it.

MR. JOHNSON: Well, your Honor, I think this brings up another problem of implementing the court's ruling. Many of the exhibits attached to the complaint were credit cards. How is the hotel supposed to know just based upon the credit card that the employee really is on government business? What if not only the employee is going to stay in the room, let us say they bring their spouse or their children? Is the hotel to somehow split the rate? Half of it will apply to the spouse and children and the other half won't be applied to employees —

THE COURT: Most of these places they don't charge any more for one than for two; that's my experience.

Now the State of California provides a certificate. I don't know why the City of Anaheim cannot fashion a certificate to it's satisfaction to have the employee sign it claiming that he is there on government business, and you have the ability to confirm it probably, if you want to.

MR. OTT: In all of the exhibits we attached, the Federal Credit Union did provide a certificate of tax exemption to the hotels, your Honor.

THE COURT: Yes.

Well, the court will stand by it's tentative ruling to deny the defendant's motion to dismiss for failure to state a claim with prejudice, and to grant the plaintiff's motion for summary judgment in favor of the plaintiff.

MR. OTT: Thank you, your Honor.

Should I submit a more specific order, your Honor?

THE COURT: I think we will prepare our own order.

MR. OTT: Thank you very much.

MR. JOHNSON: Thank you, your honor.

(Proceedings adjourned.)

* * * * * *

I, Mary Tucker, CSR, do hereby certify that the foregoing transcript is true and correct.

| | |
|---|---|
| /s/ MARY TUCKER | 1-595 |
| MARY TUCKER, CSR | DATE |

Supreme Court, U.S.
FILED
JAN 18 2000
CLERK

No. 99- 858

IN THE

# Supreme Court of the United States

CITY OF ANAHEIM,

*Petitioner,*

*v.*

CALIFORNIA CREDIT UNION LEAGUE AND UNITED STATES OF AMERICA,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENT CALIFORNIA CREDIT UNION LEAGUE

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## QUESTION PRESENTED

Whether petitioner City of Anaheim's levying its transient occupancy tax on federal credit union employees staying in local hotels while on the business of the federal credit union employer violates 12 U.S.C. § 1768 provision of tax immunity to federal credit unions.

## PARTIES TO THE PROCEEDINGS

Petitioner is the City of Anaheim ("Anaheim"). The Respondents are the California Credit Union League (the "League"), and the United States of America.[1]

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1. Amici curiae briefs were filed in the court of appeals below. The United States Government filed a brief in support of respondent California Credit Union League's position. The Credit Union National Association, Inc., joined by the Hawaii Credit Union League, National Association of Federal Credit Unions also filed briefs in support of the League. The National Institute of Municipal Law Officers filed an amicus brief in support of petitioner City of Anaheim.

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Respondent California Credit Union League requests that the Court deny the petition for writ of certiorari seeking review of an opinion of the Court of Appeals of the Ninth Circuit Court of Appeals. The Ninth Circuit decision is reported at 95 F.3d 30 and subsequently at 190 F.3d 997 (for the convenience of the Court, all citations to the Ninth Circuit opinions will be to the opinions attached as Exhibit A to the Petition). The United States District Court for the Central District of California's order denying petitioner City of Anaheim's Motion to Dismiss and granting respondent California Credit Union League's Motion for Summary Judgment (dated November 22, 1994) is attached to the Petition as Appendix B. The Judgment of the District Court (dated January 9, 1995) is attached to the Petition as Appendix C.

## STATEMENT OF JURISDICTION

The Court of Appeals initially entered its judgment on September 9, 1996. Anaheim did not petition the Ninth Circuit for rehearing. Anaheim filed a petition for certiorari on December 6, 1996. The City's petition was reviewed and granted by this court at 520 U.S. 1261 (1997) and the matter was remanded to the Ninth Circuit for further proceedings in accordance with this Court's decision in *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997). After further consideration and the addition of the United States as a party plaintiff in the suit, the Ninth Circuit issued a second opinion on September 1, 1999, confirming its earlier ruling on the merits of Anaheim's appeal. Anaheim now petitions this court as it did before, and, as it did in its previous petition, Anaheim invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

Anaheim once again appears to seek certiorari in part to have this Court answer practical questions about the legal consequences arising out of the Ninth Circuit decision which were not adjudicated by either the district court or the Court of Appeals. (Petition at 17, 18.) This Court lacks jurisdiction to rule on matters not adjudicated by the courts below.

## STATUTES INVOLVED

The controlling statute is 12 U.S.C. § 1768, a section of the Federal Credit Union Act. The applicable provision is as follows:

> The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority, except that any real property and any tangible personal property of such Federal credit unions shall be subject to . . . taxation to the same extent as other similar property is taxed . . .

The statute is set forth in full at Petition Appendix D.

## STATEMENT OF THE CASE

### A. Course of Proceedings and Disposition of the Case Below

This case involves the straight-forward application of the broad tax immunity Congress conferred on federal credit unions through 28 U.S.C. § 1768. The facts are simple and

undisputed. In November 1993, employees of twenty four federal credit unions attended a conference for credit unions held at the Disneyland Hotel in Anaheim, California. It is undisputed that the credit union employees were on credit union business. The rooms at the hotel had been reserved and paid for by the federal credit unions. The employees presented certification of federal credit union tax exempt status. Nevertheless, these federal credit union employees were assessed a 13% transient occupancy tax pursuant to Anaheim Municipal Code Chapter 2.12. The federal credit unions paid the tax under protest.

On September 1, 1994, Respondent California Credit Union League, in its capacity as a trade association representing the interests of constituent federal credit unions, filed a declaratory relief action against the City of Anaheim in the United States District Court for the Central District of California, *California Credit Union League v. City of Anaheim*, Case No. CV 94-5991 ER (GHx). The lawsuit alleged that by levying its transient occupancy tax on federal credit union employees on federal credit union business, the defendant City of Anaheim had violated the tax immunity provision of the Federal Credit Union Act, 12 U.S.C. § 1768. By its complaint, the League sought a declaratory judgment that federal credit unions are not liable for hotel occupancy taxes levied by the City of Anaheim in the limited instance where (1) the hotel rooms triggering the occupancy tax have been contracted for by the federal credit union and (2) the rooms have been paid for directly by the federal credit unions.

Anaheim filed a motion to dismiss for failure to state a claim upon which relief can be granted. The League opposed Anaheim's motion and also filed a concurrent motion for summary judgment based on undisputed facts. A hearing was

held on both Anaheim's motion to dismiss and the League's motion for summary judgment. Both parties stipulated that disposition by summary adjudication was appropriate. At the district court proceedings, Anaheim conceded that federal credit unions are instrumentalities of the federal government. (*See* Petitioner Appendix A at 3 n.1.)

At the hearing, the district court, the Honorable Edward Rafeedie presiding, announced its tentative ruling to deny Anaheim's motion to dismiss and grant the League's motion for summary judgment. The court's analysis was straightforward: employees of federal credit unions on credit union business stand in the shoes of their federal credit union employers and therefore the levy of an occupancy tax on those employees violated 12 U.S.C. § 1768. As the reporter's transcript of the hearing (attached to the Petition as Appendix F) shows, Anaheim's primary objection to the court's tentative ruling was practical, *not* legal. Upon announcing its tentative ruling, the court heard the City's argument:

> Do you wish to be heard for the City?
>
> MR. JOHNSON: Yes, your Honor.
>
> I think one of the things that needs to be addressed if the court is going to grant the motion for summary judgment, is what proof is the hotel going to need to know that this employee is on Federal Credit Union business? Some of the exhibits attached to the complaint were a little contradictory.

> THE COURT: That isn't what you have said in your papers. In your papers you said that the entity itself is exempt, not the employee. Now you are trying to change your position here a little bit.
>
> MR. JOHNSON: **What I'm concerned about, your Honor, is implementation of the court's ruling**. How is the hotel going to know when they are looking at a person whether they are there on credit union's business or they are there on personal business?
>
> THE COURT: They have the right to demand proof.
>
> MR. JOHNSON: Okay.

Reporter's Transcript, Petition Appendix F at 5 (emphasis added). Hearing nothing from Anaheim which changed the court's analysis, the court adopted its tentative as its ruling and judgment was entered in favor of the League. (Petition Appendix C.)

Anaheim appealed the judgment to the Ninth Circuit Court of Appeals arguing that the incidence of the tax fell on the employee, not the federal credit union and therefore the tax did not violate 12 U.S.C. § 1768. The appeal was fully briefed by both parties and also by *amici curiae* for both parties. The United States Government filed a brief in support of the League's position.

The United States of America was joined by the Credit Union National Association, Inc., the Hawaii Credit Union League and the National Association of Federal Credit

Unions in filing an amicus brief in support of the League. The National Institute of Municipal Law Officers filed an amicus brief in support of Anaheim.

The Ninth Circuit affirmed the summary judgment. The Ninth Circuit's decision provides a straight-forward, step-by-step analysis supporting its holding. Beginning with the express terms of 12 U.S.C. § 1768, the court noted the broad tax immunity the Congress conferred on federal credit unions. Petition Appendix A at 2-3. The court then cited to this Court's ruling (in *United States v. New Mexico*, 455 U.S. 720 (1982)) that in order to enjoy the benefit of federal tax immunity a private taxpayer must stand in the shoes of the government. Petition Appendix A at 4-5. The court then reasoned that:

> The Court's analysis in *New Mexico* compels the conclusion that federal employees are constituent parts of the United States, at least with respect to their professional duties. *See id.* When acting on behalf of the federal government, the congruence between the professional interests of the employee and those of the government is complete.

From this analysis, the court then concluded:

> Because the federal credit unions' employees were attending to credit union business while staying at the Disneyland Hotel in Anaheim, they were "constituent parts" of the credit union and immune from Anaheim's transient occupancy tax under Section 1768.

Petition Appendix A at 5. Anaheim did not seek rehearing or clarification from the Court of Appeals. It did, however,

file a petition for certiorari. Certiorari was granted (520 U.S. 1261), the Ninth Circuit's initial opinion was vacated, and the case was remanded to the Ninth Circuit for further proceedings in accordance with *Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997), relating to the issue of the necessity of the United States appearing as a party plaintiff in actions challenging the imposition of taxes upon federal instrumentalities by state and local governments. Upon remand, the Ninth Circuit granted a joint motion made by the California Credit Union League and the United States to add the United States as a party plaintiff under Federal Rules of Civil Procedure, Rule 21. Additionally, the court stated that it would "affirm the district court's award of summary judgment in favor of the League for the reasons set forth in our prior opinion" (Petition Appendix A15). Anaheim has now filed a new petition for certiorari substantially identical to its prior petition.

**B. Corrections of Misstatements in the Petition**

Pursuant to United States Supreme Court Rule 15.1, respondent brings the following misstatements contained in the petition to the Court's attention.

Petitioner Anaheim misstates the scope of the Ninth Circuit's decision as going to constitutionality[2], as opposed to statutory construction. It is, however, unambiguous on the face of the Ninth Circuit's decision that the decision is

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2. Anaheim states: "[W]hether, the City of Anaheim can constitutionally levy its TOT tax upon employees of federal credit unions (or federal employees), when the employee is on employer business (as evidenced by an exemption form) and the employer pays the hotel directly through an employer check." (Petition, p. i)

based on statute (12 U.S.C. § 1768), *not* the Constitution. Indeed, the Ninth Circuit specifically says so:

> Independent of the protection afforded by Section 1768, courts have generally considered federal credit unions to be instrumentalities of the federal government and thus immune from state taxation under the supremacy clause. [Citations omitted.] Relying on our decision in *Jesinger v. Nevada Federal Credit Union*, 24 F.3d 1127, 1132 (9th Cir. 1994), the National Institute of Municipal Officers ("cities") argues, in an amicus brief, that federal credit unions are not instrumentalities of the United States. [Footnote omitted.] *Because courts have considered the immunity afforded by Section 1768 to be coterminous with that afforded by the supremacy clause, we do not address the cities' argument.* [Citations omitted.] If credit unions would be immune from local taxation were they to be considered an instrument of the federal government, then *regardless of the instrumentality question they are immune from local taxation under Section 1768. See Michigan*, 801 F.2d at 807.

(Petition Appendix A at 3, emphasis added.)

Anaheim also misstates the Ninth Circuit's holding: "The Ninth Circuit holds, in effect, that employees of federal instrumentalities are federal instrumentalities themselves." To the contrary, in its decision, the Ninth Circuit merely held that *when doing the business of the credit union*, credit union employees stand in the place of the credit union for purposes of assessing their entitlement to tax immunity under the statute:

> The Court's analysis in [*United States v.*] *New Mexico* [, 455 U.S. 720, 738 (1982)] compels the conclusion that federal employees are constituent parts of the United States, *at least with respect to their professional duties. See id. When acting on behalf of the federal government, the congruence between the professional interests of the employee and those of the government is complete.*

(Petitioner's Appendix A at 5, emphasis added.)

Anaheim also misstates the scope of issues adjudicated at the District Court and Court of Appeals levels. Anaheim states:

> The issue of whether the court has to make a distinction if the employee pays for the hotel room with a private check was raised below.

Petition, p. 20. As the district court's order (Petition Appendix B) and judgment (Petition Appendix C) and the court of appeals decisions (Petition Appendix A) demonstrate, this issue manifestly was not adjudicated below. It was "raised" only in the sense of colloquy during the district court's hearing. (Petition Appendix F.) This issue is not ripe for review by this Court as suggested by Anaheim. Anaheim's "citations" to *United States v. Montgomery County*, 761 F.2d 998 (4th Cir. 1985) are misleading to the extent that they substitute the words "federal credit union" for the original wording in the court's opinion (at pp. 6,7, and 14 of the Petition).

## REASONS FOR DENYING THE WRIT

This case is about a municipality so intent on maintaining its taxing authority that it seeks to circumvent plain statutory tax immunity for federal credit unions by tortured semantics. By its instant petition, Anaheim refuses to heed the sound analysis and unambiguous decisions issued by both the district court and court of appeal which flatly rejected its strained argument. Instead, money is *the* issue.[3] Indeed, it is surprising how unguardedly forthright Anaheim is in admitting its prioritization of revenue collecting over compliance with Section 1768:

> If the hotel (serving as the statutory tax-collector) hands over the correct sum due the City of Anaheim, the City is not going to object to the hotel's accepting payment from the federal credit union employer.

(Petition at 13.)

---

3. This could not be more clear. Anaheim proclaims:

> The practical effect of the Ninth Circuit's opinion is to permit all federal credit union and federal employees to stay in hotels in any city without paying a TOT [transient occupancy] tax while they are on business. Thousands of dollars in TOT tax revenue will be lost annually to the City of Anaheim and other cities nationwide if the Ninth Circuit decision stands. (Petition at 6.)

However, Anaheim is mistaken; it is not the Ninth Circuit decision which circumscribes its ability to tax federal credit unions, but rather Congress in enacting 12 U.S.C. § 1768.

Anaheim concedes — as it must — that under Section 1768 it cannot tax a federal credit union. Not able to tax federal credit unions directly, it then tries to make an end run around the plain language of Section 1768. Anaheim argues that it is the *employee* of the federal credit union, not the federal credit union, who is taxed. Anaheim argues that because it is the employee and not the federal credit union who sleeps in the hotel, the occupancy tax does not violate Section 1768. This argument is remarkable. Of course a federal credit union (like a corporation or any other nonnatural person) can act *only* through its employees and agents. Thus, the district court and Ninth Circuit in this case (and this Court in other cases) were absolutely correct in holding that when doing the government's business, the government employee stands in the government's shoes. How could it be otherwise?

To accept Anaheim's strained logic would mean that any taxing authority could get around the Section 1768 tax immunity by simply wording the tax ordinance[4] or statute such that it was the employee, rather than the federal credit union, that was taxed. This plainly is not what Congress intended. When Congress enacted Section 1768, it intended for federal credit unions to be free from taxation, both legally and practically. The Ninth Circuit Court of Appeal's

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4. Anaheim argues that the Ninth Circuit's decision here "is contrary to the plain language of the Anaheim Municipal Code." (Petition, p. 7.) The United States Congress has legislated that cities, states and other local taxing authorities *cannot* tax federal credit unions. It is therefore patently beside the point whether the Ninth Circuit's decision "is contrary to" the City's ordinance. What matters is that application of the ordinance to the federal credit union violates federal statute. *See United States v. State of Michigan*, 851 F.2d 803, 807 (6th Cir. 1988).

affirmance of the District Court's award of summary judgment is therefore a straightforward application of the statute, is not in conflict with this Court's authority or that of any other Circuit and does not require review by this Court.[5]

---

5. Rule 10 of the Supreme Court Rules sets forth the Court's guidelines for deciding petitions for writs of certiorari. In pertinent part, Rule 10 provides:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." Rule 10, Rules of the Supreme Court. In addition to this general statement, Rule 10 also sets forth criteria which "indicate the character of the reasons the court considers:
>
> (a) A United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or as so far departed from the accepted and usual course of judicial proceedings, or sanctions such a departure by a lower court, as to call for an exercise of this court's supervisory power; . . .
>
> (c) A state court or a United States Court of Appeals has decided an important question of federal law that has not been, but should be, settled by this court, or has decided an important federal question in a way that conflicts with relevant decisions of this court.

Rule 10.

Anaheim, in its Petition, patently fails to establish *any* of these criteria demonstrating a "*compelling*" need for this Court's review.

### A. The Ninth Circuit Decision Holding That The City Of Anaheim's Tax On Federal Credit Union Employees In The Course Of Their Business For The Credit Union Violates 12 U.S.C § 1768 Is A Routine Application Of The Statute And This Court's Authority.

In its decision, the Ninth Circuit merely and routinely interpreted the scope of the tax immunity conferred on federal credit unions by the Congress under 12 U.S.C. § 1768. *See generally* Petition Appendix A. Although Anaheim tries to add a Constitutional dimension to the Ninth Circuit decision, it simply is not there. *See* discussion at Misstatements section *infra*. The Circuit Court's analysis is a well reasoned interpretation of Section 1768 which accurately applies principles and precedents established by this Court. There is *no* need, much less a compelling need, for review by this Court.

As part of the Federal Credit Union Act, Congress enacted 12 U.S.C. § 1768. And, as the Ninth Circuit states in its decision,

> 12 U.S.C. § 1768 confers upon federal credit unions broad immunity from federal, state, and local taxation:
>
> The Federal credit unions organized hereunder, their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority, except that

> any real property and any tangible personal property of such Federal credit unions shall be subject to . . . taxation to the same extent as other similar property is taxed.

(Petitioner Appendix A at 2-3.) The statute is thus express and unambiguous that federal credit unions are immune from *all* taxation "except that any real property and any tangible personal property of such Federal credit unions shall be subject to . . . taxation to the same extent as other similar property is taxed." Accordingly, Anaheim does not — cannot — dispute that federal credit unions are exempt from its transient occupancy tax. But in its apparent desperation to collect the expected "thousands of dollars in TOT tax revenue . . ." per year (Petition at 6), Anaheim constructs a legal fiction — nay, a semantic fiction — that if it taxes the *employees* of the federal credit union while they are conducting the credit union's business, they have somehow jumped outside the reach of Section 1768 immunity. But such semantic gymnastics cannot frustrate the intent of Congress to immunize federal credit unions from local transient occupancy taxes.

And so held the Ninth Circuit. In rejecting Anaheim's argument that because it is the employee who slept in the hotel room, it was the employee *personally* who was taxed rather than the employee doing the federal credit union's business and therefore standing in the credit union's shoes (or in this case, lying in the credit union's bed), the Ninth Circuit utilized this Court's decision in *United States v. New Mexico*, 455 U.S. 720 (1982). Petition Appendix A at 4.

In *New Mexico*, this Court considered the propriety of taxing contractors providing research and other services

involving nuclear energy to the federal government. There the Court specifically discussed the distinction between the government's employees and agents, on the one hand, and independent contractors with the government on the other. *Id.* at 739-740. And the basis of that distinction was precisely that when a government employee is doing the government's business, there is an identity between the government and the employee; no separation exists. However, with an independent contractor, even when the contractor is doing services for the government, the interests never merge and the contractor is *always* separate and distinct from the government. *Id.* This Court's distinction between the identity of interests between an employee and the federal employer and the separation of interests between a federal agency and its independent contractor is unambiguous:

> **In contrast to federal employees,** then, Sandia and its fellow contractors cannot be termed "constituent parts" of the Federal Government. It is true, of course, that employees are a special type of agent, and like the contractors here employees are paid for their services. But **the differences between an employee and one of these contractors are crucial.** The congruence of professional interests between the contractors and the Federal Government is not complete; their relationships with the Government have been created for limited and carefully defined purposes. Allowing the States to apply use taxes to such entities does not offend the notion of federal supremacy. (455 U.S. 720, at 740-741, emphasis added).

*In accord, see Alabama v. King & Boozer*, 314 U.S. 1, 11, 62 S. Ct. 43 (1941) (holding tax was permissible because it fell upon a contractor, rather than a government agent or employee).

The Ninth Circuit's analysis and application of *New Mexico* in its decision here is straightforward:

> In *New Mexico*, the Supreme Court, noting "the confusing nature of our precedents," concluded that the essence of the federal government's tax immunity is a prohibition against states assessing taxes "directly upon the United States." 455 U.S. at 733. Immunity from state or local taxation is only appropriate "when the levy falls on the United States itself, or an agency or instrumentality so closely connected to the Government that the two cannot realistically be viewed as separate entities, at least insofar as the activity being taxed is concerned." *Id.* at 735. To avoid paying state or local taxes, "a private taxpayer must actually stand in the Government's shoes." *Id.* at 736 (internal citations omitted). *See also United States v. County of San Diego*, 965 F.2d 691, 697 (9th Cir. 1992) (quoting *New Mexico*).

Petition Appendix A at 4. Thus the Ninth Circuit's analysis and use of this Court's precedent is proper and does not invite, much less require, this Court's review.

Anaheim's reliance on *United States v. County of Fresno*, 429 U.S. 452, 97 S. Ct. 699, 50 L. Ed. 2d 683 (1977), also fails to establish that the Ninth Circuit's decision is

appropriate for review by this Court. In *Fresno*, this Court upheld a state property tax levied against forest rangers for their *personal* possessory interest in their homes, which were located on federal property, even when the government reimbursed the employees for the tax. *Fresno* is inapplicable here because the nature of the interest taxed is fundamentally different. In *Fresno*, the Court approved the tax on the government employee because the tax was of a personal nature, as opposed to an employee carrying out an official government function. *Id.* at 466. The personal nature of the interest was even admitted in the government's complaint:

> The government's complaint in this case alleges that the occupancy of the forest service houses constitutes part of appellant's "compensation" for services performed — thus, conceding that the occupancy is of personal benefit to the employee . . . the forest service itself purports to measure the personal benefit of the occupancy to the employee and collects rent in such amount through deductions from the employees paycheck. Since virtually everyone in this country pays for housing for himself or herself and family, common sense compels the conclusion that the occupancy of the house provided by an employer for the employee's family is a personal financial benefit to the employee.

429 U.S. at 466.

It is well-established that income, or compensation, of government employees is taxable. *See Graves v. New York*, 306 U.S. 466 (1939). Accordingly, contrary to Anaheim's argument, *Fresno* in no way shows that the Ninth Circuit

decision here in any way extends or goes contrary to this Court's precedents. The Petition should be denied.

### B. There Is No Conflict With The Fourth Circuit Court Justifying This Court Granting Certiorari.

Anaheim argues that the Ninth Circuit decision here conflicts with the Fourth Circuit opinion in *United States v. Montgomery County*, 761 F.2d 998 (4th Cir. 1985). The City's interpretation is in error. In *Montgomery County*, the Fourth Circuit held that Montgomery County could constitutionally[6] impose a transient occupancy tax on *outpatients* of the National Institute of Health (the "NIH"). *Id.* at 1002. This has nothing to do with whether **employees** of a federal credit union doing credit union business can be lawfully taxed.[7] The decision in *Montgomery County* does not even discuss *employees* of the NIH, much less render a holding concerning employees of a federal instrumentality. And Anaheim admits as much. Consider its characterization of the Fourth Circuit's holding:

> that a county tax on transients renting hotel sleeping accommodations fell on the occupants

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6. Plainly the Ninth Circuit decision cannot conflict with the Fourth Circuit's decision in *Mongtomery County*; the Ninth Circuit interpreted a statute, the Fourth Circuit the U.S. Constitution.

7. Anaheim chastises the Ninth Circuit for not discussing *Montgomery County* (Petition at 6) and characterizes its decision as being "in direct conflict with" the Fourth Circuit decision (Petition at 7). The reason the Ninth Circuit did not discuss *Montgomery County* is plain; it is inapplicable to the analysis. And the Ninth Circuit decision is not "in direct conflict with" *Montgomery County*; it is a wholly different analysis.

> of the sleeping accommodations [*who were outpatients at the National Institutes Of Health ("NIH")*] . . .

(Petition at 11, emphasis added.) But the Ninth Circuit decision does *not* involve guests of a federal instrumentality, it involves employees. The analogous situation to *Montgomery County* would be if the League were seeking tax exempt status for *nonemployee* guest presenters at the credit union conference. Thus, the Ninth Circuit's holding that federal credit unions can occupy rooms as transients through their employees is therefore entirely consistent with the Fourth Circuit's decision in *Montgomery*. There is no conflict justifying, much less compelling, review by this Court.[8]

This Court recently discussed two types of challenges to state and local taxation by the federal government in *Arizona Department of Revenue v. Blaze Construction Co., Inc.*, 119 S. Ct. 957, 526 U.S. 32 (1999). In that case, concerning the assessment of an Arizona transaction privilege tax on a contractor of the Bureau of Indian Affairs, this Court stated:

> These principles control the resolution of this case. Absent a constitutional immunity or congressional exemption, federal law does not

8. Anaheim admits that the Ninth Circuit's decision is in accord with the position of the Comptroller General, 55 Comp. Gen. 1278, 1280-81 (1976). (Petition at 14-15.) Anaheim then tries to distinguish this case depending (again) on the tautological argument that because the federal credit union itself did not sleep in the room, it was the employee personally who was taxed, not the credit union. Again, Anaheim's position would completely eviscerate Section 1768.

> shield Blaze from Arizona's transaction privilege tax (Citations). The incidence of Arizona's transaction privilege tax falls on Blaze, not the Federal Government. Blaze does not argue that it is an agency or instrumentality of the Federal Government, and *New Mexico's* clear rule would have foreclosed any such argument under these circumstances. Nor has Congress exempted these contracts from taxation (Citing *Carson v. Roane-Anderson Co.* 342 U.S. 232, 72 S. Ct. 257 (1952)) 119 S. Ct. 957, 960.

The Fourth Circuit's opinion in *United States v. State of Maryland*, 488 F. Supp. 347 (1980), *aff'd*, 636 F.2d 73, *cert. den.*, 451 U.S. 1017 (1981) illustrates a different analysis predicated upon a statutory claim of tax immunity. In that case, the United States brought suit against the State of Maryland for imposing state taxes upon a member of Congress who maintained a residence in that state in order to carry out his governmental duties. A specific statute (4 U.S.C. § 113) exempted the Congressman from individual state income tax under the circumstances presented. In summarizing its response to the case before it, the court stated:

> Congress is our one and only national legislative body. Surely it is a more important federal instrumentality than any agency or corporation which it creates. Thus the *Graves* holding that employees of a corporation created by Congress as a federal instrumentality are not impliedly immunized by the Constitution itself from the type of Maryland taxation involved herein does not necessarily mean that the Constitution does not

> impliedly immunize a Member of Congress. But since Congress has expressly by the 1977 Act provided its Members with such immunity, the question of whether a Member of Congress enjoys such implied constitutional immunity need not be answered herein.

(488 F. Supp. 347, 359). The present case is nearly identical. Although the federal credit union constituents of Respondent California Credit Union League steadfastly maintain that they are federal instrumentalities pursuant to their creation by federal law, they are nonetheless beneficiaries of a specific federal statute, 12 U.S.C. § 1768, which exempts them from state and local taxation. Thus, for this further reason, The Ninth Circuit's opinion in this matter does not conflict with any decisions of this Court or of any appellate court, including the Fourth District.

### C. It Is For The District Courts, Not This Court, Initially To Adjudicate The Application Of The Ninth Circuit Holding Through Specific Cases And Controversies As Required By Article III Of The Constitution.

In a fundamental misapprehension, Anaheim argues that this Court should grant certiorari because otherwise "cities all over the country will face uncertainty in the application of their TOT taxes." Anaheim raises various questions it has concerning the practical effects of the Ninth Circuit's ruling, for example:

> The issue of whether the court has to make a distinction if the employee pays for the hotel room with a private check was raised below. The Ninth Circuit opinion does not directly answer this issue.

(Petition at 20.)

The Ninth Circuit Opinion does in fact answer the relevant question. The rule is: Federal credit union employees on credit union business are entitled to the tax exemption of 12 U.S.C. § 1768. It's that simple.

But more fundamentally, if Anaheim has lingering questions about the legal consequences of the Ninth Circuit decision, it has the options of seeking an advisory opinion of an appropriate administrative agency or instituting a declaratory relief action in *district* court. However, it is utterly plain that the court of appeals (and most certainly this Court) are not authorized by Article III of the Constitution to idly ruminate on the various practical parameters of a particular court decision. Rather, over a dispute such as this, the courts of appeal and this Court have *review* jurisdiction, not original jurisdiction. This Court patently lacks jurisdiction (on this record) to rule on the particular, collateral questions Anaheim raises. Accordingly, these lingering questions not only do not — they cannot — justify granting certiorari. The Petition should be denied.

## CONCLUSION

The Ninth Circuit's affirmance of the district court's award of summary judgment here is a routine application of the unambiguous provisions of 12 U.S.C. § 1768. The decision raises no conflict with the Fourth (or any other) Circuit. And while the League agrees with Anaheim that the Ninth Circuit addresses an important taxation issue, the Ninth Circuit's decision soundly resolves the issue with a clear, well reasoned analysis consistent with Congressional intent and existing authority. In short, there is *no* reason for this Court to review the decision. The petition should be denied.

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(3)

No. 99-858

# In the Supreme Court of the United States

CITY OF ANAHEIM, PETITIONER

*v.*

CALIFORNIA CREDIT UNION LEAGUE AND UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTION PRESENTED

Whether a local government may levy a hotel occupancy tax on employees of a federal credit union traveling on credit union business when the credit union reserves the rooms and pays the taxes directly.

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A5, A6-A15) are reported at 95 F.3d 30 and 190 F.3d 997. The order of the district court (Pet. App. B1-B2) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on September 1, 1999. The petition for a writ of certiorari was filed on November 18, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. Section 7280(a) of the California Revenue and Tax Code (West 1998) authorizes any city to levy "a tax on

the privilege of occupying a room or rooms * * * in a hotel, * * * motel, or other lodging unless the occupancy is for any period of more than 30 days." Acting pursuant to that authority, the City of Anaheim enacted an ordinance providing that, "[f]or the privilege of occupancy in any hotel, each transient is subject to and shall pay a tax in the amount of thirteen percent of the rent." Anaheim Mun. Code § 2.12.010.010 (1992). A "transient" is defined as "any person who exercises occupancy, or is entitled to occupancy, of any room, space, lot area or site in any hotel by reason of concession, permit, right of access, license or other agreement whether written or oral." Anaheim Mun. Code § 2.12.005.100 (1992). "Each operator [is required] to collect the tax to the same extent and at the same time as the rent is collected from every transient." Anaheim Mun. Code § 2.12.020.010 (1992).

2. In November 1993, federal credit union employees stayed at a hotel in the City of Anaheim while on credit union business (Pet. App. A2). The hotel collected the occupancy tax from the credit union employees. The California Credit Union League, acting on behalf of its member federal credit unions, thereafter filed this action to obtain a declaratory judgment that the levying of petitioner's transient occupancy tax on employees staying at hotels on credit union business violated 12 U.S.C. 1768 (Pet. App. A7).[1] That statute specifies that, with exceptions not at issue in this case,

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[1] The League limited its request for declaratory relief to situations in which (i) the federal credit union pays the invoice directly or (ii) the employee traveling on credit union business pays with the credit union's corporate credit card. This case does not involve situations in which (i) a payment is made by an employee using his own funds or (ii) the credit union subsequently reimburses the employee for such a payment (Pet. App. F7).

federal credit unions "shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority." 12 U.S.C. 1768.

The district court granted summary judgment to the League (Pet. App. B1). The court reasoned that federal credit union employees "stand in the shoes of the government, and the incident [sic] of the tax should fall on the government as their employer, not them as employees" (*id.* at F4).

3. The court of appeals affirmed (Pet. App. A1-A5). The court noted that 12 U.S.C. 1768 confers a broad immunity from state and local taxation upon federal credit unions—an immunity that is "coterminous with that afforded by the supremacy clause" (Pet. App. A3). The court stated that this broad federal immunity from local taxation extends to employees of federal entities engaged in the performance of "their professional duties" (*id.* at A5, citing *United States* v. *New Mexico*, 455 U.S. 720 (1982)). The court concluded that, "[b]ecause the federal credit unions' employees were attending to credit union business while staying at the Disneyland Hotel in Anaheim," they were immune from the local occupancy tax under 12 U.S.C. 1768 (Pet. App. A5).

The court of appeals explained that *United States* v. *County of Fresno*, 429 U.S. 452 (1977), on which petitioner mistakenly relies, supports the League's position in this case. In *County of Fresno*, this Court held that employees of the United States Forest Service could be taxed for the value of their possessory interest in houses that were supplied for their personal use by the United States. While the state tax upheld in *County of Fresno* thus properly reached only the personal benefit of the house to the Forest Service employees, the credit union employees involved in this case were improperly

subjected to an occupancy tax "solely because they were in the city on credit union business" (Pet. App. A5).

4. Petitioner filed a petition for a writ of certiorari (Pet. App. A7). While that petition was pending, this Court decided *Arkansas* v. *Farm Credit Services of Central Arkansas*, 520 U.S. 821 (1997), in which four production credit associations sought to enjoin the State of Arkansas from levying taxes against them. This Court addressed whether the Tax Injunction Act, 28 U.S.C. 1341, barred that suit.[2] While recognizing that the Tax Injunction Act "does not constrain the power of federal courts if the United States sues to protect itself or its instrumentalities from state taxation" (520 U.S. at 823), the Court concluded that instrumentalities chartered under federal law such as production credit associations "may not sue in federal court for an injunction against state taxation without the United States as co-plaintiff." *Id.* at 824. Following that decision, the Court granted the petition for a writ of certiorari in the present case, vacated the judgment of the court of appeals and remanded for further consideration in light of *Farm Credit Services* (Pet. App. A7, A8; 520 U.S. 1261).

5. On remand, the League and the United States filed a joint motion in the court of appeals to join the United States as a co-plaintiff. The court of appeals held that "the United States can join this lawsuit because it is requesting the same remedy as the League

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[2] 28 U.S.C. 1341 provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

and offers the same reasons for that remedy and because earlier joinder by the United States *would not* have affected the course of [the] litigation" (Pet. App. A9). The court further noted that, under *Mullaney* v. *Anderson*, 342 U.S. 415 (1952), and *Newman-Green, Inc.* v. *Alfonzo-Larrain*, 490 U.S. 826 (1989), "the joinder of the United States as a plaintiff in this case has retroactively cured the jurisdictional defect identified by *Farm Credit Services*" (Pet. App. A13). The court of appeals then affirmed the decision of the district court on the merits, for the reasons stated in its prior opinion (*id.* at A15).

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. "[I]t is well settled that, absent express congressional authorization, a State [or local Government] cannot tax the United States directly." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 175 (1989). The federal immunity from state and local taxation has its roots in the Supremacy Clause of the Constitution (*South Carolina* v. *Baker*, 485 U.S. 505, 518 n.11 (1988)), and it applies not only to the United States but also to federal instrumentalities, such as the Red Cross (*Department of Employment* v. *United States*, 385 U.S. 355, 358, 360-361 (1966)), federal land banks (*Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 101-103 (1941)) and federal credit unions (*United States* v. *Michigan*, 851 F.2d 803, 805-807 (6th Cir. 1988)). Congress expressly conferred this broad immunity on federal credit unions by enacting 12 U.S.C. 1768, which specifies (with exceptions not involved in

this case) that such credit unions "shall be exempt from all taxation now or hereafter imposed by * * * any State, Territorial, or local taxing authority * * * ."[3] "[T]he immunity [thus] afforded by Section 1768 [is] coterminous with that afforded by the supremacy clause" (Pet. App. A3).

When, as here, a local Government imposes its hotel occupancy tax on agents of a federal instrumentality traveling through that locality on government business, that tax is barred both by the Supremacy Clause and by 12 U.S.C. 1768. As the court of appeals correctly held, "[b]ecause the federal credit unions' employees were attending to credit union business while staying * * * in Anaheim, they were 'constituent parts' of the credit union and immune from Anaheim's transient occupancy tax under Section 1768." Pet. App. A5.

2. Petitioner contends (Pet. 7-11) that, in reaching this conclusion, the court of appeals improperly relied on two decisions of this Court. That contention is not correct.

a. In *United States* v. *County of Fresno*, 429 U.S. 452 (1977), the United States Forest Service provided housing to some of its employees as partial compensation for their services. The agency made a deduction from the cash wages of each such employee to reflect the estimated fair market value of this housing. *Id.* at 454. Two California counties imposed an annual *ad valorem* property tax on the possessory interest of these employees in the Forest Service cabins in which they resided. In upholding the constitutionality of this

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[3] Congress, however, has allowed state and local taxation of "any real property and any tangible personal property of such Federal credit unions * * * to the same extent as other similar property is taxed." 12 U.S.C. 1768.

local tax, this Court noted that "the occupancy of the Forest Service houses constitutes part of [the employees'] 'compensation' for services performed * * * [and] that the occupancy is of personal benefit to the employee." *Id.* at 466. The Court distinguished this sort of local taxation of the value of personal benefits (such as housing or wages) received by federal employees from impermissible attempts to subject federal functions or federal property to taxation: "[a]n attempt by California to impose a use tax on a Forest Service employee for his fire ax—which he used *only* in performing his job—or on a fire tower inhabited by such employee in the daytime and solely in order to perform his job would present a different question." *Id.* at 466 n.15. See also *Telegraph Co.* v. *Texas*, 105 U.S. 460, 462 (1882) (tax on telegraph messages sent by government officers on government business is unconstitutional); *United States* v. *County of Humboldt*, 628 F.2d 549, 552, 553 (9th Cir. 1980) (local tax unconstitutional if the legal incidence of the tax is on the federal government or if it interferes with a federal function or activity).

The distinction drawn by the Court in *County of Fresno* applies directly here. In this case, the employees of the federal instrumentality are not occupying hotel rooms for personal benefit. Instead, as petitioner concedes (Pet. 2), these employees are traveling on official federal credit union business. Unlike in *County of Fresno*, these facilities are not provided to employees as a form of compensation in lieu of their monetary wages. The hotel rooms are made available to these employees solely to provide them with a place to sleep while traveling on official business.[4] The employee does

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[4] Congress has, of course, long recognized that the costs of employee travel while away from home, including amounts expended

not experience a decline in his normal housing costs (such as rent or mortgage payments) or otherwise personally benefit from the travel. The court of appeals was thus correct in concluding (Pet. App. A5) that the decision in *County of Fresno* supports its holding in this case.

b. The court of appeals also correctly relied on the decision of this Court in *United States* v. *New Mexico*, 455 U.S. 720 (1982). In *New Mexico*, "[t]he Government concede[d] that the legal incidence of the gross receipts and use taxes f[ell] on the [Government] contractors." *Id.* at 738. The issue addressed in that case was "whether the contractors can realistically be considered entities independent of the United States." *Ibid.* In concluding that contractors are not to be treated as "'constituent parts' of the Federal Government," the Court emphasized that "the differences between an employee and one of these contractors are crucial." *Id.* at 740. The Court explained that "[t]he congruence of professional interests between the contractors and the Federal Government is not complete; their relationships with the Government have been created for limited and carefully defined purposes." *Id.* at 740-741. Employees, by contrast, are "a special type of agent." *Id.* at 740.

In the present case, petitioner sought to impose taxes on employees engaged in the official business of the federal instrumentalities. The court of appeals correctly relied on the "crucial" distinction between contractors and employees recognized by this Court in *New Mexico*.

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for lodging, are ordinary and necessary business expenses of the employer. See 26 U.S.C. 162(a)(2).

3. Petitioner also errs in contending (Pet. 11-17) that the decision in this case conflicts with *United States* v. *Montgomery County*, 761 F.2d 998 (4th Cir. 1985). In that case, the court upheld an occupancy tax applied to hotel rooms rented by the National Institutes of Health for the temporary use of some of its outpatients. The court concluded that, even though NIH reserved and paid for the rooms, Montgomery County could apply its transient occupancy tax to the patients who used the rooms.

The rooms involved in the *Montgomery County* case were occupied by third parties who were not conducting business on behalf of NIH. In the present case, by contrast, the rooms were occupied by employees of the federal credit unions solely in connection with the performance of official business of those federal instrumentalities. As the court of appeals correctly stated in this case (Pet. App. A5, citing *United States* v. *New Mexico*, 455 U.S. at 740-741), when federal employees are acting on government business, they are properly treated as "'constituent parts' of the United States."[5]

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[5] For similar reasons, petitioner errs in contending (Pet. 20-22) that the decision in this case conflicts with the state court decisions in *Comptroller* v. *World Inns, Inc.*, 528 A.2d 477 (Md. 1987), and *Keystone Auto Leasing, Inc.* v. *Norberg*, 486 A.2d 613 (R.I. 1985). The *World Inns* case, like the present case, involved an occupancy tax. Unlike the present case, however, the employees in *World Inns* "contracted directly with [the hotel] for the rental of rooms and paid for the rooms with their personal funds." 528 A.2d at 481. The state court relied on these facts in concluding that the incidence of the tax fell on the employees and not the United States. *Ibid.* The court did not suggest that the tax would be permissible if, as in the present case, a federal entity reserved and paid for the rooms. The *Keystone Auto Leasing* case also addressed "situations in which federal employees lease automobiles and pay with cash or personal credit cards" (486 A.2d at 616) and it is therefore

Petitioner correctly notes (Pet. 12-13, 18) that the Fourth Circuit concluded in *Montgomery County* that the local occupancy tax involved in that case applied to the outpatients as "transients" and that "the United States Government * * * simply does not meet the definition of 'transient'" as defined in the local statute. 761 F.2d at 1001. That description of the local law at issue in *Montgomery County*, however, creates no conflict with the holding of the court of appeals in this case. Even when "the legal incidence of a tax falls on contractors or individuals" under local law, "the question remains whether those parties are independent entities" or are a constituent part of the United States (Pet. App. A4). "If they are not independent, the tax is invalid because it is a tax on the United States * * * ." *Ibid.* The difference between this case and *Montgomery County* does not turn on the legal incidence of the tax under local law; instead, it turns on the fact that in this case (unlike in *Montgomery County*) the persons using the hotel rooms were employees of a federal instrumentality engaged in the official business of that entity and not engaged in a personal use of the hotel rooms for personal benefit.[6]

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distinguishable from the present case for this same reason. The Comptroller General of the United States has long taken the position that "reimbursement" situations, such as those involved in *World Inns* and *Keystone*, are not appropriate occasions for the assertion of the federal government's tax immunity. 55 Comp. Gen. 1278 (1976).

[6] Petitioner incorrectly contends that the brief reference to a "visiting employee or guest" in the *Montgomery County* decision demonstrates that the "court dealt with the issue of 'employees'" in that case (Pet. 18). The only issue presented in *Montgomery County* was the constitutionality of the tax as applied to outpatients. There is no discussion in that case of the constitutionality

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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of a local tax applied to rooms used by employees of the federal government engaged in official business, and the court did not purport to make any holding pertaining to such official uses.

(4)

Supreme Court, U.S.
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No. 99-858

IN THE

# Supreme Court of the United States

CITY OF ANAHEIM,
*Petitioner,*

*vs.*

CALIFORNIA CREDIT UNION LEAGUE, AND
UNITED STATES OF AMERICA,
*Respondents.*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## PETITIONER'S REPLY BRIEF

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## QUESTION PRESENTED

Whether, under 12 U.S.C. § 1768 and the federal supremacy clause, the City of Anaheim can constitutionally levy its transient occupancy tax upon employees of federal credit unions (or federal employees) when the employee is on employer business and the employee pays the hotel with an employer check advanced by the employer.

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# I.

## INTRODUCTION

The opposition briefs filed by Respondents, California Credit Union League ("League") and the United States ("U.S.") argue that League employees are not subject to Petitioner's transient occupancy tax ("TOT") because the employees are agents of League and, therefore, the legal incidence of the TOT falls on the government. Further, the League employees do not derive any personal benefit from the hotel room. As will be demonstrated below, Respondents' arguments fail on both grounds. Although the employees of League may be traveling on League business, the activity being taxed, to wit, the personal use of a hotel room, is not part of the League's business. Further, it simply defies all logic and common sense to argue that a private room in a premiere resort hotel does not confer a personal benefit on the guest of the hotel.

Petitioner will also show that review by this Court is necessary because of the obvious conflict between the circuits on this important issue of federal taxation law. The Fourth District in *United States v. Montgomery County*, 761 F.2d 998 (4th Cir. 1985), in effect, elevated guests of the federal instrumentality to the status of employees of that instrumentality in order to reach its common sense conclusion that the federal government simply does not meet the definition of "transient." Thus, Respondents attempt to distinguish the *Montgomery County* case fails.

## II.

## THE LEGAL INCIDENCE OF THE TOT FALLS ON THE EMPLOYEES OF LEAGUE AND NOT ON LEAGUE

Respondents place heavy reliance on *United States v. New Mexico*, 455 U.S. 720, 102 S.Ct. 1373, 71 L.Ed.2d 580 (1982), to support their position that the League employees stand in the shoes of the League when they stay at the Disneyland hotel and, therefore, the legal incidence of the TOT falls on League. On close scrutiny, however, Respondents argument has no merit.

As this Court correctly stated, immunity from state or local taxation is only appropriate, "when the levy falls on the United states itself, or an agency or instrumentality so closely connected to the government that the two cannot realistically be viewed as separate entities, *at least insofar as the activity being taxed is concerned.*" 455 U.S. at 736 (emphasis added). What both Respondents choose to ignore is the activity being taxed, namely, the *private* use of a hotel room. With respect to that activity, the government and the government employees are separate entities. If such were not the case, the government would have unfettered right to entry into the private hotel room of any of its agents at any time. Surely Respondents and this Court could not support such an outrageous, yet logical extension of Respondents' argument.

The fact that the League employees would not be using the hotel room but for traveling on League business misses the point. The employee's use of the hotel room, just like the employee's meal, is inherently personal. Accordingly, the costs associated with the use of the

room fall on the employee. The decision of the League to reimburse its employees for the TOT does not convert the TOT to a tax on the government. As the Fourth District stated, "... the United States Government ... simply does not meet the definition of 'transient.' " *Montgomery County*, *supra*, 761 F.2d at 1000.

## III.

## LEAGUE EMPLOYEES RECEIVE A PERSONAL BENEFIT FROM STAYING AT THE DISNEYLAND HOTEL

Respondents attempt to distinguish this Court's decision in *United States v. County of Fresno*, 429 U.S. 452, 97 S.Ct. 699, 50 L.Ed.2d 683 (1977), by arguing that the federal employees in that case derived a personal benefit from the housing provided by the government. In *County of Fresno*, this Court based its decision on the fact that the local tax at issue was on personal benefits of the employee, i.e., wages and not a tax on federal functions or federal property. 429 U.S. at 466. Recognizing that this distinction was the basis for this Court's decision in *County of Fresno*, Respondents make the bold, yet wholly unsupported, assertion that the League employees enjoy no personal benefit from the hotel room. Once again Respondents' analysis falls short. The activities that take place in a private hotel room such as sleeping, eating, watching television or other personal activities are simply not federal functions. Likewise, an employee's personal hotel room does not constitute federal property. If it did, the federal government would have unfettered right to access to the private hotel rooms of its employees. Of course, as a matter of law, this is not the case.

As stated earlier, the fact that the League employees would not be staying at the hotel but for League business does not eliminate the personal nature of the hotel room and the activities that take place therein. The federal employees in the *County of Fresno* case would not have the need for federal housing but for their federal job. Yet, this Court properly upheld the local tax in that case. Petitioner's TOT is a tax on the use of a hotel room. That use is not a government function, but a personal activity from which the League employees derive a personal benefit. As stated by the California Attorney General, "I[n] our view, the tax remains on the employee for 'the privilege of occupying a room.'" 75 Ops.Cal.Atty.Gen. 86, 88 (1992). Accordingly, the TOT should be upheld.

## IV.

## REVIEW BY THIS COURT IS NECESSARY TO RESOLVE A CLEAR CONFLICT BETWEEN THE NINTH CIRCUIT AND THE FOURTH CIRCUIT

Conceding that the Fourth Circuit in the *Montgomery County* case determined that the transient occupancy tax in that case fell on the person occupying the room and not the federal government, Respondents attempt to distinguish that case on the ground that the hotel occupants in that case were guests of the federal government and not federal employees. A close reading of the *Montgomery County* case reveals the fatal flaw in Respondents' argument.

The Fourth District in *Montgomery County* held that given the definition of the term "transient" in the local ordinance, "... the United States Government which arranges a room ... which is occupied only a day or two at a time by any one visiting *employee* or guest simply does not meet the definition of 'transient' " 761 F.2d at 1000 (emphasis added). Respondent U.S. dismisses this statement by describing it as a "brief reference to a 'visiting employee or guest.' " U.S. Opposition at 10, n.6. Respondent League surprisingly states that "*Montgomery County* does not even discuss *employees.*" League Opposition at 18. Both Respondents have misconstrued the Fourth District's analysis of the issue. In light of the facts of the *Montgomery County* case, the Fourth District necessarily elevated the National Institutes Of Health's ("NIH's") guests to the status of employees of a government instrumentality in reaching its conclusion. If, as Respondents suggest, the *Montgomery County* case has nothing to do with employees of government instrumentalities, the Fourth District could have easily, and presumably would have, concluded that the tax falls on a third party, without any reference to "employees." It did not do so. Instead, it treated the NIH guests on equal footing with NIH employees, and consistent with the analysis in *New Mexico* and *County of Fresno*, concluded that, as a matter of law, the federal government cannot engage in the personal activity of occupying a private hotel room as a transient. The Fourth Circuit then held: "Since the tax falls on the transient, the occupant of the sleeping accommodations, the fact of reimbursement by the United States or one of its agencies does not invalidate it under the supremacy clause." *Montgomery County, supra*, 761 F.2d at 1002. The Ninth Circuit's decision fails to even mention the precedent established by the Fourth Circuit.

Petitioner submits that the *Montgomery County* case presents the more reasoned conclusion consistent with this Court's precedent, and for that reason, the Ninth Circuit's opinion should be reversed. At a minimum, however, this Court is presented with inconsistent federal appellate court decisions on a important issue of federal taxation law, and, therefore, review is necessary to resolve the conflict.

## V.

## CONCLUSION

The Ninth Circuit erred in holding that Petitioner's TOT is a tax on federal business and not a tax on the personal activities of transients as defined in Petitioner's Municipal Code. The Ninth Circuit opinion directly conflicts with the opinion of the Fourth District regarding the application of a local transient occupancy tax on employees of federal agencies or instrumentalities.

Accordingly, based upon the foregoing and for all the reasons set forth in Petitioner's Petition, Petitioner respectfully requests that this Court grant Certiorari to review this important issue.

DATED: February 11, 2000.

Respectfully submitted,

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